TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 216

ALGOMA PLYWOOD AND VENEER COMPANY,
PETITIONER,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED AUGUST 11, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

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Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

8-11 PETITION (Omitting formal parts)

8 Now comes the Wisconsin Employment Relations Board, the petitioner above named, by John E. Martin, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and for cause of action alleges and shows to the court:

1. That the Wisconsin Employment Relations Board, hereinafter referred to as the board, is and at all times mentioned herein, was an adminis-

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trative body created by Ch. 57 of the Laws of 1939 as amended by Ch. 515 of the Laws of 1939, Ch. 465, Laws of 1943 and Chs. 424 and 504 of the Laws of 1945.

2. That the Algoma Plywood and Veneer Company (hereinafter referred to as the company or the employer) is a corporation authorized to do business in the State of Wisconsin and is engaged in the manufacture of wooden products, having its plant located in the City of Algoma, Kewaunee County, Wisconsin; and that said company usually transacts business in said county.

3. That Victor Moreau is a resident of the City of Algoma, Kewaunee County, Wisconsin and until the 14th day of January, 1947 was an employee of the Algoma Plywood and Veneer Company.

9 4. That on or about January 27, 1947 said Victor Moreau filed a complaint with the board charging the above named respondent with having engaged in unfair labor practices within the meaning of sec. 111.06, Wisconsin Statutes, as more fully appears by the record of the proceedings of the board filed herein in the Circuit Court for Kewaunee County.

5. That after due notice and hearing upon said complaint, the board did on the 30th day of April, 1947, make and file its decision, findings of fact, conclusions of law and order with reference to said charges of unfair labor practices, a true and correct copy of which is attached hereto, marked Exhibit A and made a part hereof.

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6. That copies of said decision, findings of fact, conclusions of law and order, Exhibit A, were duly served upon the respondent above named; that said order since its issuance has been in full force and effect; that the respondent has not within the time required in said order notified the Wisconsin Employment Relations Board in writing what steps it has taken to comply therewith; that the board is informed and believes that the said respondent has failed and neglected to take any steps to comply with the terms of said order and alleges that said respondent has wholly failed and neglected to comply with the cease and desist provisions of the order or the affirmative action requirements and provisions thereof; that on the contrary said respondent contends that said order is invalid and has petitioned to have the same set aside and further contends that the respondent is under no obligation to comply with the said order.

7. That the said board has caused to be certified and filed in this courts its record in the proceedings entitled

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"Victor Moreau, R. #1, Algoma, Wis.
represented by J. J. Gray, 6138
Plankinton Building, Milwaukee, Wis.,
Complainant,

v.

Algoma Plywood and Veneer Company,
Algoma, Wisconsin,
Respondent.

Case II, No. 1565 Ce-222, Decision No. 1291" all documents and papers on file in the matter, the pleadings and testimony upon which the order therein was entered and the findings and order of the board to which record reference is hereby made and the same is incorporated herein as if specifically set forth.

WHEREFORE the board prays that the court enter a judgment and decree confirming and enforcing all of the provisions of the order herein referred to, Exhibit A, and for such other relief as the facts and circumstances may warrant.

Dated May 22, 1947.

11-14 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD (Omitting formal parts)

11 The above entitled matter having come on for hearing on the 21st day of February, 1947, before the Wisconsin Employment Relations Board, Chairman L. E. Gooding and Commissioner J. E.

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Fitzgibbon being present, the Board having heard the testimony, and being advised in the premises, does hereby make and file the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. That Victor Moreau is a resident of Algoma, Wisconsin, and until the 14th day of January, 1947, was an employe of the respondent, Algoma Plywood & Veneer Company.

2. That the respondent, Algoma Plywood & Veneer Company, hereinafter referred to as the Company, is a corporation authorized to do business in the State of Wisconsin, and is engaged in the manufacture of wooden products, having its plant located in the City of Algoma, Wisconsin.

3. That the intervenor, Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, and hereinafter referred to as the Union, is an unincorporated labor organization having its principal office in the City of Algoma, Wisconsin.

4. That on the 5th day of April, 1946, the Company and the Union entered into a collective bargaining agreement which provided that such agreement should become effective on the 29th day of April, 1946 and remain in effect for a period of one year from the 29th day of April, 1946, and shall automatically be renewed from year to year

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thereafter unless the party desiring to terminate the contract shall give to the other party thirty (30) days written notice before the expiration of any year, of its desire to terminate the contract.

12 5. That Article 1 of said agreement provided among other things:

> "All employes who, on the date of the signing of this agreement, are members of the union in good standing in accordance with the constitution and by-laws of the Union, and those employes who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing."

6. That the complainant, Victor Moreau, failed to maintain his membership in good standing in the Union by failing and refusing to pay dues as required by the Union.

7. That on the 7th day of January, 1947, the complainant Moreau was notified by the Union of such arrearage in his dues and that unless this arrearage was taken care of before Monday, January 13, that he would no longer be allowed to work and would also be fined $1.00.

8. That on January 14, in the morning, he was directed to report to the office of the Company. There were present the Vice President and Factory Manager, Mr. Fulwiler, representing the Company and the Chairman of the Grievance Committee, representing the Union. At that con-

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ference the complainant announced that he would quit his job rather than pay any dues to the Union; whereupon he was advised by the Vice-President of the Company to punch out.

9. That no referendum pursuant to Section 111.06 (1) (c) of the Wisconsin Statutes, has ever been conducted by the Wisconsin Employment Relations Board for the purpose of giving the employes of the employer an opportunity to approve the inclusion of any type of "All-Union" agreement provisions in any collective bargaining agreement between the parties.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSIONS OF LAW

1. That the inclusion in the collective bargaining agreement between the Company and the Union of a provision requiring all employes who were members of the Union in good standing at the time of the signing of the collective bargaining agreement must maintain their membership in that Union as a condition of employment encouraged membership in Local No. 1521 of the Carpenters and Joiners of America, and is in violation of Section 111.06 (1) (c) of the Wisconsin Statutes.

2. That by requiring and attempting to require all employes of the company who were members

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in good standing in the Union on the date of the signing of the agreement to maintain their membership in good standing as a condition of employment with the Company, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 111.06 (1) (c) of the Wisconsin Statutes.

3. That the termination of employment of Victor Moreau was brought about by reason of his failure to maintain his membership in the Carpenters & Joiners of America, Local No. 1521, and constituted discrimination by the company in regard to the hire or tenure of employment of said Victor Moreau.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

13

ORDER

IT IS ORDERED that the Algoma Plywood & Veneer Company, its officers and agents, shall immediately:

1. Cease and desist from

(a) Encouraging membership in Local No. 1521, Carpenters & Joiners of America, affiliated with the American Federation of Labor by discriminating in any man-

ner with the hire or tenure of its employes whether they are or are not members in good standing in such labor Union.

(b) Encouraging membership in Local No. 1521, Carpenters and Joiners of America, or any other labor organization, by requiring as a condition of employment that any employe become or remain a member of any such labor organization, as a condition of employment unless and until the employes approve such provision by a referendum as provided in Section 111.06 (1) (c) of the Wisconsin Statutes.

2. Take the following affirmative actions which the Board finds will effectuate the policies of the Act:

(a) Offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice ot his seniority or other rights or privileges.

(b) Make whole Victor Moreau for any loss of pay that he may have suffered by reason of the company's discrimination against him, by payment to him of a sum of money equal to the amount he nor-

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mally would have earned in wages during the period from the date of his discharge to the date of the company's offer of reinstatement, less the net earnings and unemployment compensation he may have had during such period.

(c) Post at its plant at Algoma, Wisconsin, copies of the Notice attached hereto marked Exhibit A. Copies of said notice shall be prepared by the employer, signed by the employer's representative and posted by the employer immediately upon receipt of a copy of this order, and maintained by it for thirty (30) consecutive days thereafter in conspicuous places, including all places where notices to employes are customarily posted.

(d) Notify the Wisconsin Employment Relations Board in writing within five (5) days from the date of receipt of a copy of this order what steps the employer has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of April, 1947.

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EXHIBIT A

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Board, we hereby notify our employes that we will not in any manner interfere with their rights to self-organization and to form, join or assist any labor organization of their choice. That we will not require any of our employes to become or remain members of Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization as a condition of employment; that we will not enforce or attempt to enforce any provision contained in any written collective bargaining agreement between our company and Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, which requires as a condition of employment that all employes who were members of such union on the 5th day of April, 1946, or have since become members of such union, must maintain their membership in good standing; we will offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to any seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of such discrimination.

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All of our employes are free to join or assist labor organizations of their choice, or to refrain from such activities. All of them are free to become and remain members of Local No. 1521, Carpenters and Joiners of America, or any other labor organization, or to refrain from any organizational activities. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employe because of membership in or activities on behalf of any labor organization, or the failure to maintain membership in any labor organization.

ALGOMA PLYWOOD AND VENEER COMPANY

By .....

16-106 PROCEEDINGS BEFORE WISCONSIN EMPLOYMENT RELATIONS BOARD

19-20 Complaint (Omitting formal parts)

19 The Complainant above named complains that the Respondent has engaged in and is engaging in unfair labor practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, and in that respect alleges: that on January 14, 1947, Victor Moreau was discharged. On the morning of January 14th, Mr. Moreau was called into the office of Ray R. Fulwiler, an official of the Company, and a number of other employees were

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called in for non-payment of dues. They all agreed to pay their dues with the exception of Mr. Moreau who refused to pay dues into the organization. Mr. Smith, a representative of the union, was also present and he said, "I am sorry, Victor, but this is the rule," and Mr. Fulwiler asked Mr. Moreau what he was going to do about it. Mr. Moreau stated he would not pay any more dues. Mr. Fulwiler then told him to punch out and go home.

Submitted by: John J. Gray

John J. Gray, representing Victor Moreau

An unfair labor practice is based upon the fact that no election has been held to determine a maintenance of membership clause by the Wisconsin Employment Relations Board between the Carpenters and Joiners, AFL Local 1521, and the Company. The maintenance of membership clause contained in the contract is as follows:

> "All employees who on the date of the signing of this Agreement are members of the Union in good standing in accordance with the Constitution and By-Laws of the Union and those employees who may thereafter become members shall during the life of the Agreement as a condition of employment remain members of the Union in good standing."

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MEMORANDUM

January 23, 1947

In the year of 1937, the Carpenters and Joiners AFL Local 1521 organized the workers at the Algoma Plywood and Veneer Company, Algoma, Wisconsin. In the fall of 1938, an independent union took over the representation of the employees in the above-mentioned company. There was no election held by any government agency in this matter. The Carpenters and Joiners Local 1521 petitioned the National Labor Relations Board for representation of the workers in the Algoma Plywood and Veneer Company and a hearing was held in Case No. 12-R-449, and an election was ordered by the Board at which time the AFL Local No. 1521 won the election. A contract was negotiated which did not contain any maintenance of membership clause. In 1943, after negotiations were started for a new contract, the union petitioned the National War Labor Board to settle a labor dispute which existed. A hearing was held and the War Labor Board instructed the company, among other things, to sign a contract embodying a maintenance of membership with a 15-day escape clause. Early in the year of 1942 the Algoma Plywood and Veneer Company petitioned the Wisconsin Employment Relations Board for an election to determine an all-union shop. The Company later withdrew their petition and the Board dismissed the case on April 3, 1942.

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On January 14, 1947, Victor Moreau was discharged. On the morning of January 14th, Mr. Moreau was called into the office of Ray P. Fulwiler and a number of other employees were called in for non-payment of dues. They all agreed to pay their dues with the exception of Mr. Moreau who refused to pay dues into the organization. Mr. Smith, a representative of the union, was present and he said, "I'm sorry, Victor, but this is the rule" and Mr. Fulwiler asked Mr. Moreau what he was going to do about it. Mr. Moreau stated he would not pay any more dues. Mr. Fulmiler then told him to punch out and go home.

On January 15, 1946, Harry E. Jones and John J. Gray called at the company's offices in Algoma, Wisconsin, and discussed the matter of the discharge of Victor Moreau with Mr. Charles G. Yerkes, President of the company, together with Ray P. Fulwiler. The company's position was that they did not discharge Mr. Moreau, but that he voluntarily quit. Our position was that the maintenance of membership clause in the contract was illegal in view of the fact that no election has been held to decide the maintenance of membership or an all-union shop with the said company and that the company was in violation of the law in calling in said employees to the office to force them to pay their dues. Both Mr. Yerkes and Mr. Fulwiler admitted that the maintenance of membership clause was illegal, but stated that it had been ordered on them by the War Labor Board against their

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wishes and that we could rest assured that when the contract again came up that this matter would be settled by the Wisconsin Employment Relations Board. Mr. Yerkes' position was that he was caught between two fires; that he either had to violate the laws of the State of Wisconsin or violate his contract, and that he preferred that this matter be referred to the Wisconsin Employment Relations Board for determination.

22-57 TRANSCRIPT OF TESTIMONY BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

23 Pursuant to notice, the above entitled matter came on for hearing before the Wisconsin Employment Relations Board in the Lounge Room, Manitowoc County Court House, Manitowoc County, Wisconsin, on February 21st, 1947, commencing at 10:00 A. M.

Present:
Chairman L. E. Gooding
Commissioner J. E. Fitzgibbon

Appearances:
Complainant, by Mr. John Martin, Attorney at Law, Milwaukee, Wisconsin

Respondent, by Whyte, Hirschboeck & Minahan, Attorneys at Law, by Mr. Roger C. Minahan, Milwaukee, Wisconsin.

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Local 1521, Carpenters and Joiners, A. F. L., by Padway, Goldberg & Previant, Attorneys at Law, by Mr. Saul Cooper, Milwaukee, Wisconsin

WHEREUPON the following proceedings were held:

CHAIRMAN GOODING: Now, we have two matters here. The first one is one in which Victor Moreau is Complainant and the Algoma Plywood and Veneer Company is Respondent, and one which is a petition for an election among the employees of the Algoma Plywood and Veneer Company filed by the employer. I think properly we should first take up the unfair labor practice complaint.

MR. COOPER: May I make a statement, Mr. Gooding? We aren't a part of the pleadings here, and on behalf of the Carpenters we'd like to intervene and state our position. I don't have any written reply or answer, Mr. Chairman, but I can state my statement into the record.

24 CHAIRMAN GOODING: All right.

MR. COOPER: Our first defense, of course, is that the maintenance of membership contract involved in proceedings here is a legal one; that this contract was entered into before the present law was enacted, and that the contract is actually a renewal of pre-existing contract, and it is a substance of the contract, of course, which will guide rather than its form, and that if this contract is

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interpreted as conflicting with the present law, then such present law so interpreted is unconstitutional.

* * * And there has been no answer filed on behalf of the Company either; is that right, Mr. Minahan?

MR. MINAHAN: That is correct. I'd like to state the position of the Company at this time.

CHAIRMAN GOODING: All right.

MR. MINAHAN: With reference to the Moreau complaint, the company's position is that it denies that the complainant Moreau was discharged by the employ—from the employ of the Company, and takes the position that he voluntarily quit the employ of the Company. Secondly, that the maintenance of membership clause is a legal provision not invalid under the Wisconsin law for the reason that this contract was merely a continuation and a renewal of pre-existing contracts entered into originally first in 1943. I think that is all of our position with respect to that.

MR. MARTIN: The position of the C. I. O., of course, is that the maintenance of membership provision does not conform to the requirement of the Wisconsin Statute as amended in 1945, which required all or any of the employes to determine that by a referendum vote whether or not they wished to be represented by a union, and further that Mr. Moreau was discharged by the Company because of his failure to comply with that provision in the contract which covered main-

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tenance of membership, and that Mr. Moreau of course is entitled to reinstatement and reinstatement with back pay, because the provision of the contract is inoperative in that it doesn't conform with the Wisconsin law.

25 CHARLES G. YERKES, being first duly sworn on oath testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am the president of Algoma Plywood and Veneer Company. Local 1521, Carpenters and Joiners of America are the collective bargaining representative for the company's employees and have been since 1942. There was an election held in 1942 by the National Labor Relations Board in which they were certified as the exclusive bargaining agents. The Carpenters' union represents all employees of the Algoma Plywood and Veneer Company except for administrative, executive, supervisory and office employees. It covers all production employees. We entered into written
26 contracts with the Carpenters and Joiners after 1942. The first contract was entered in April 1942. It did not have a maintenance of membership clause. The maintenance of membership provision of the contract was put in in 1943. During the bargaining procedure, the union had many points that they wished to incorporate in the new contract. One of them was maintenance of member-

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ship. It had not been in before and we asked the United States Department of Labor for a conciliator in order to bring us up to date on laws. They assigned John Lucke, a man from Escanaba. Lucke advised us in the proceedings to put in the maintenance of membership clause, stating that President Roosevelt had agreed with all unions as a part of a no-strike pledge to include maintenance of membership and that if we did not put it in, it would be put in by the War Labor Board anyhow. The case went to the War Labor Board in which we submitted our whole contract including the maintenance of membership clause. It was approved and sent back in a directive from the Chicago district office of the War Labor Board. There was no appeal from that directive.

27 From that time on the maintenance of membership clause was considered a part of the contract and was written therein. We have an annual contract. Each year since 1943 maintenance of membership has been included in the contract.

There was no check-off of dues. It was the union's duty entirely to notify us when their members were not in good standing. As a matter of fact, the union did from the time of the directive order inform us when employees were not in good standing. The unions have a constitution and by-laws in which they define good standing. We left entirely to them as to who is in good standing; that is part of our contract. I am not familiar with the constitution and by-laws of the union. I have

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inquired in a general way as to what good standing may have meant. In our bargaining proceed-
28 ures, we have inquired as to what is meant by good standing. What we understand membership in good standing to mean is that a man must not be delinquent in his dues; that his assessments must be paid or any financial obligation to the union must be paid. The second point was that his conduct would be such that he was considered a member of the union and not to do anything against the general laws of the country. It is entirely up to the union what length of time a man would have to be delinquent before he ceased being in good standing. There was never any understanding between the company and the union with respect to that.

A certification that the union would give as to a member not being in good standing was sufficient from the company's standpoint. We take the position that the union and members know their constitution and by-laws. If his union reports to us that he is delinquent and he is not delinquent, he has the grievance procedure to go through in which it would be necessary to prove that he had violated that so we rely upon the grievance procedure rather than our having any intimate knowledge of the inner workings of the union.

29 The procedure in connection with the certification by the Carpenters that members are not in good standing is: The union would notify the man that he was not in good standing. I presume at the

same time as notifying the company. The way it is actually worked, without getting into the inside of the union which I do not know, they notify men by postal card or another means that they are not in good standing and those men then have the chance to go to their union and either dispute it or not. After the union has determined that the man is delinquent, the company is notified by the union by letter that certain members are not in good standing.

The general procedure then is for the general factory manager, Mr. Fulwiler, to call the man into his office and ask him if he is familiar with that procedure. If the man states that he is and decides to come into good standing, it is a closed incident. Otherwise if he says that he is not going to get in good standing, the normal procedure would be for him to file his answer with the Grievance Committee. Then the Grievance Committee would go into all of the details of it in which the exclusive bargaining agency is represented. The company is represented, the man is allowed to be present, can have anybody with him for witnesses that he wants to. It is an entirely informal hearing in which the man states his case and from that the Grievance Committee makes recommendation to the company. That would be the normal proceeding if it went that far. Any man in our employ can ask for a grievance hearing at any time and get it in one minute's notice. The grievance procedure has to be at the request of the em-

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ployee. How else would we know there was a grievance if it wasn't requested?

After the man is called into the office by Mr. Fulwiler and has elected not to put himself in good standing, whether we have reached an impasse would depend upon what action the man would take. If he says "I just elect not to put
31 myself in good standing" which has not occurred, it would go to the Grievance Committee in there in order to keep our normal relations right with the bargaining agent. You are asking a hypothetical question that hasn't been answered and I am not a crystal ball gazer, and I am giving you what would actually happen. After the person had elected not to be in good standing before anything further would take place, the matter would be considered by the Grievance Committee. I don't think I could answer when the Grievance Committee would consider the matter. Pretty definitely it would take place before any further action would be taken on the matter.

The Carpenters' union has certified many times that employees were not in good standing. That is done before they are officially not in good standing. I believe they begin not in good standing of a certain date whenever their dues are due, and there is no definite data in there. It would not be periodical at all. It would be just as the occasion
32 arose. The occasion has arisen. Whether it has arisen very often that is an indefinite term. No one in the life of the contract since 1943 has been

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discharged for non-payment of dues because they have paid their dues. No inquiry is made on the part of the company to see that they have paid their dues. We accept the word of the Carpenters
33 and Joiners union that the member is in good standing and wait for a further certification.

There has never been any discussion between the company and the union with respect to taking a referendum in order to comply with the requirements of the state law for a maintenance of membership clause in the contract.

The discharge of Mr. Moreau never took place. He did work for the Algoma Plywood and Veneer Company. I was not present when Mr. Moreau's employment was terminated.

34 CROSS-EXAMINATION BY MR. COOPER:

Well over 95% of our business deals in interstate commerce. Very little of it is done in the State of Wisconsin. The majority is outside.

RALPH FULWILER, being first duly sworn on oath, testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am vice-president and factory manager of the
35 Algoma Plywood and Veneer Company. The circumstances which lead up to termination of Mr. Moreau's employment are: Mr. Eldor Schmidt, chairman of the Grievance Committee, asked me

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to sit in with him when he talked to Mr. Moreau. Mr. Moreau was asked up to my office. He came in and I said "Sit down, Victor. You probably know what you are here for." Victor didn't sit down and he says "Yes, I will quit before I pay my dues." He said "I'd be willing to pay $10.00 to a Union that would help me out, but nothing to this one." Mr. Schmidt then made the remark that he hadn't been mistreated, that he was sorry this had to happen. What I mean by "This had to happen" is that Vic had been called up and taken that attitude.

So Vic in the meantime was walking out and I says if he felt that way that he should punch out. If he felt that he had rather quit than pay his dues and that he'd pay $10.00 to an organization, but none to this. When I said that, what I meant was if he was going to quit he should punch out and go home. I said "Then you better punch out
36 and leave the plant." Something to that effect, if you feel that way. There was no elaboration on the expression "If you feel that way." Nothing further took place while Vic was in the office. He was on his way at the time. The whole episode lasted about 30 seconds. There was no discussion with Mr. Moreau in my office after I had called him, nothing further than what you have heard. Mr. Moreau indicated that he understood the situation.

Notice had been given to the company orally on the morning of January 14 that Mr. Moreau was

not in good standing. The company called Mr. Moreau in then. There were three others that were certified at the same time as not being in good standing. The other three were called in on the 14th. I believe they paid their dues and became members in good standing or at least they made arrangements so that the union certified them to us as being in good standing. I did not at any time consider any other action subsequent to a man's electing not to be in good standing. The occasion never arose for a Grievance Committee meeting before the enforcement of the terms of the maintenance of membership clause and I didn't think anything further about it. There had never in my experience been any understanding with the union that such would take place.

Q The understanding was that if a member elected not to remain in good standing that he would be discharged?

MR. MINAHAN: I object to that—assuming it, I mean, is your purpose to ask the question as to whether or not there was such an understanding?

MR. MARTIN: The purpose of my question was to draw from Mr. Fulwiler just what he understood by the application of a maintenance of membership contract—clause of the contract if an employe would elect not to remain in good standing with his Union.

CHAIRMAN GOODING: We are not particularly interested in what he understood.

We are interested in what the contract provides.

MR. MINAHAN: I think that draws for a conclusion.

CHAIRMAN GOODING: Objection sustained.

No one has approached me subsequent to the 14th of January with respect to the discharge of Mr. Moreau. After Mr. Moreau's termination of employment some representative of the United Paper Workers of America, CIO approached us and discussed the matter. I was in Mr. Yerkes' office and there were two representatives of the CIO there. They discussed the matter with Mr. Yerkes. I was a witness. I did not participate.

ELDOR SCHMIDT, being first duly sworn on oath, testified:

DIRECT EXAMINATION BY MR. MARTIN:

I am an employee of the Algoma Plywood and Veneer Company and I am a member of the Carpenters and Joiners union. I am chairman of the Grievance Committee and have been for last year and this year. There was a different fellow, then he become to be a foreman and then put me in again to take his place. As chairman of the Grievance Committee all I have to do is the Financial Secretary gave me a report that he was in arrears

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and I was the one to just notify the Company or take it in to them. After I got this report from the Financial Secretary I went up personally and just told him in my own words who of the members of the union is in arrears. There was nothing in writing. I then participated in meetings when members that were in arrears were called into the company's office.

40 When an employee was called into the office because of his ceasing to be a member in good standing what would take place as a rule was: I told Mr. Fulwiler I'd like to send out a notice. Never paid their dues or even answered us or anything so I had Mr. Fulwiler call them in and ask these fellows that they are in arrears. Sometimes they would pay up right away or just the idea I suppose, they had to come in the office and they paid, otherwise they wouldn't have; I don't know. But we never had no trouble till Mr. Moreau walked out.

My understanding of a member not in good standing is if he is three months in arrears in his dues.

41 I had four fellows that were in arrears at the time Mr. Moreau was called into Mr. Fulwiler's office. I asked Mr. Fulwiler to call them. He called them in one at a time and the other three, two of them paid up right away and the other fellow didn't have any money along so he said he would bring it next night which he did. Mr. Moreau came in and Mr. Fulwiler says "Have a chair." and

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Vic would not sit down. He just stood there and Fulwiler asked him "I suppose you know what you are in here for?" And he said "Yes." And he says "I will quit before I will pay my dues." He said "I'd sooner belong to an organization and pay $10 a month than to belong to an organization that don't do anything for me." And I said "Vic, we treated you right." And he walked out and Fulwiler, I guess, did make a statement then "You better punch out" when he left and was walking out. That's all that was said.

I told him "We have treated you all right, Victor." I didn't see any reason why we didn't. That is all that was said.

VICTOR MOREAU, being first duly sworn on oath, testified:

42 DIRECT EXAMINATION BY MR. MARTIN:

I was an employee of the Algoma Plywood and Veneer Company. I started about five years ago but off and on stayed home for farming. I think it was a year last October since I started again and worked continuously outside of three weeks when I was sick and a day here and there when I missed. I was a member of the Carpenters and Joiners union. Every time I went back to work they came and found me in the yard and I paid up until this last time. I was not always in good standing in the union with respect to my dues. I

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would say the first time I was not in good stand-
43 ing was about a year after I joined. At the time
that I was first not in good standing I was so in-
formed by the Carpenters and Joiners by a card.
I was called into the office and that time Mr. Mer-
cer who was the employment agent I guess called
me in. When I got in the office he wasn't there.
Young Thomas, an office man, was there. He called
up for Mercer. Mercer said "Well, Thomas told
me if you want to punch out you have to go home"
so I put my bags in and I went home. A week or
so later I met Mr. Fulwiler on a corner about a
block from the factory. He said "Why ain't you
working?" I said "The Union pushed me out."
Mr. Fulwiler said "We'll see about that" and a
little after that I got a letter from Mercer to report
for work. I came there and he said "What you
going to do about the dues?" I said "If I got to pay
them, I ain't going to pay them." He said "Why
don't you start new again and pay your $2.00 and
44 start with $1.00 a month again?" I went to a guy
they call "Punkin." I think that was about in 1944.
When I went back to work I paid a $2.00 initiation
fee and started paying dues. I considered myself
a member of the union from then on. The union
did not state anything to me at that time about
making up arrearage. I don't know what year it
was I quit because I had too much work at home
and then in the fall I started working again, and
then I think it was Schmidt here asked me about

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the back dues. I said "I will bring them to you." He said "If you bring it in the morning it is all right." The next morning I brought them and said "How much do I owe you?" He said "Nine Dollars." I said "I don't owe you that much back dues. If you need the money, here it is." Then in the afternoon he brought me $3.00 back. He looked the books over and they did overcharge me. That was subsequent to the 1944 period which I previously described.

This year I got a card stating if I didn't pay my money the 13th I was no longer employed there. I didn't pay any attention to it and then on the 14th Charles Dion came to me. He is supposed to be a straw foreman in John Paape's yard. He said that Fulwiler wanted to see me in the office. When I went up there a guy was just walking out and Fulwiler said "I suppose you know why I got you up?" I said "Just about." He said "What you going to do?" I said "I ain't going to pay." He said "Punch out and go home then.' I said "If they had an organization here that treats everybody alike I'd be willing to pay $10.00." Smitty answered "I think they treated you right. I'm sorry, Vic, but that's our rules."

In other words I was told to punch out and go home before I made the remarks that I would pay $10 to an organization but not to this organization. I did not in any way indicate to Mr. Fulwiler or Mr. Schmidt that I was quitting.

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The last part of the conversation was when Smitty said "I am sorry, Vic, but that's our rules." Then I left. I punched out at 9:58.

CROSS-EXAMINATION BY MR. MINAHAN:

I got a card that if I didn't pay my dues Monday the 13th would be my last day to work. Exhibit 1 signed by Mary Kostickka is the card I got. I understand she is the Financial Secretary of the Carpenters and Joiners union.

(Exhibit 1 received in evidence.)

CHARLES G. YERKES, testified further:

DIRECT EXAMINATION BY MR. MINAHAN:

I became associated with the Algoma Plywood and Veneer Company in 1943. I came with the company in the middle of the negotiations in April 1943. They had been doing some before I came and they were completed after I came. I came as president of the company. I have negotiated the contracts with the union since that time. Exhibit 2 is the contract which we entered into with the Carpenters and Joiners union in 1942. Exhibit 3 is the copy of the contract which was entered into with the company and Carpenters Union in 1943. That contract is dated in June 1943. It contained the maintenance of membership clause. That clause was negotiated with the union prior to sub-

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mission of disputed matters to the War Labor Board. The contract provides that it is to be effective from the 29th of April, 1943. It reverts back to a continuation of the 1942 contract.

Exhibit 4 is a copy of the agreement entered into between the company and the union in 1945.

Exhibit 5 is a copy of the agreement entered into between the company and the union in 1946. Article XII of the agreement of 1943 reads:

> "Term of Contract. This agreement shall become effective as of the 29th day of April, 1943, and remain in effect for a period of one year from that date, and shall automatically be renewed from year to year thereafter unless the party desiring to terminate the contract shall give to the other party thirty (30) days written notice before the expiration of any year of its desire to terminate the contract."

That same provision was incorporated in the
50 rewritten contracts in 1944 and 1945 and in 1946.

The company has never served any notice of termination of any contract with the Carpenters and Joiners union. The union never served any notice of termination of contract to the company. In spite of that fact each year this contract was rewritten. That is because a contract of that kind becomes quite a bulky and unwieldy document if you keep adding amendments to it each year. Under our present economic period and the way it was during the war, there have been changes in wage rates, classifications, vacations and numerous

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other articles of that kind, so rather than put amendments to the original 1942 contract, it has been rewritten changing only those articles on which we agree, the balance of the contract kept right on going.

CROSS-EXAMINATION BY MR. MARTIN:

In connection with the succession of contracts, 1943, 1944, 1945 and 1946 according to Article XII, the contract would become effective without changes unless notice had been given thirty days previous to the expiration date. It is a little hard to say whether these changes were made as a result of the notification by the company or the union to the company that it desired changes. In the instance of three years of negotiations, I would
51 say that the union has brought up points which they desired to change. I don't recall and I wouldn't be too positive that the company have had any revisions to make. Notification was given by the union or the company, one to the other, in accordance with the terms of Article XII.

MR. MINAHAN: I object to that question. The witness has already testified no notifications were given under the terms of the contract for termination, which is the only thing it provides for at any time.

CHAIRMAN GOODING: The objection is overruled.

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No notification had been given by either side of termination of the contract. The union have asked for bargaining privileges to go over some articles in there, principally wages. * * * In 1943 there were certain items in dispute on this contract that were submitted to the War Labor Board and the War Labor Board directed the company to incorporate in the agreement. The maintenance of membership clause was put into our contract
52 on the advice of the representative of the United States Department of Labor. It finally developed in there that the whole contract should be submitted to the War Labor Board, including the articles that were in dispute and they passed upon the whole contract. They approved the maintenance of membership. We have not agreed upon it prior to the submission to the War Labor Board. It was an article that was not in 1942 and we disputed putting it into the contract but on the advice of the Department of Labor it was included in there, and submitted to the War Labor Board for approval or removal.

REDIRECT EXAMINATION
BY MR. MINAHAN:

The union made a demand in 1943 for the inclusion of the maintenance of membership clause. The company did not immediately grant that demand. Sobsequently a representative of the Department of Labor, Conciliation Service, attempt-

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ed to further the negotiations and he advised us on the question of the inclusion of this clause in the agreement. He said it was a part of the War Labor Board policy backed by a number of deci-
53 sions that they had made in similar cases in which they had put it in. He stated that it would very definitely be put in by the War Labor Board whether it were written into the contract or not and we asked that the whole contract be submitted to the War Labor Board for their approval or disapproval. We finally agreed upon the inclusion of the maintenance of membership clause because it was our understandigg that there was no question but what it would be ordered by the War Labor Board when the matter was submitted to them.

RALPH FULWILER, being recalled, testified:

DIRECT EXAMINATION BY MR. MINAHAN:

I am the vice president and factory manager of the Algoma Plywood and Veneer Company. In that capacity I have over-all supervision of the personnel in the production department. The practice wtih respect to disposition of problems between the union and members of the union or employees in the plant has been: An employee with a grievance sees one of the Grievance Committee and this covers not only the members of the union but the non-members that come through

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the Grievance Committee. Then we meet twice a month. The Grievance Committee meets with me and Mr. Mercer our superintendent. These grievances come either in writing or verbally, any
54 way they feel like putting them to us. The entire meeting is strictly informal; notes are being taken and a report is made when we are through. We discuss each item and make our decision. Sometimes we agree; sometimes we don't. There are times when we haven't agreed and it has come up two or three times and in subsequent grievance meetings, sometimes change is made and sometimes it isn't. At the conclusion of the meeting of the Grievance Committee with Mr. Fulwiler and myself we always take some official action on behalf of the company either granting the request or denying it. I don't think we have ever had a meeting where nothing came up. The report is typewritten and a copy is given to the chairman of the Grievance Committee, who takes it to the union meeting, as I understand it, and reads the dispositions made.

The union never certified anyone not in good standing. They customarily reported to us informally that someone was not in good standing. Our practice in that case was to meet with the chairman of the Grievance Committee and try to talk things over with the employees that were not in good standing. Naturally we liked to keep the
55 help we have and it was my point to try to keep them on the job. I cannot recall the incident at all

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of meeting Mr. Moreau in the street and asking him why he wasn't working. I just don't recall it.

The company has never discharged an employee for failure to maintain his standing with the union.

CROSS-EXAMINATION BY MR. MARTIN:

I was familiar with the fact that Mr. Moreau stopped work from time to time to be on the farm or matters of that kind. I am familiar with occurrences when Mr. Moreau's employment was terminated previously but I wouldn't know the day it happened, don't you see. It would come to me indirectly from the superintendent probably a day later or two or three days later. I wouldn't be in on the direct incident. I don't recall the reason for the termination of Mr. Moreau's employment previously of which he spoke. I remember talking to Vic probably the time he mentioned in his testimony, but what was said and what was done, I don't recall. He left our employ three times and returned three times and that goes over a period from 1942 on. I can't very well remember that.

56 REDIRECT EXAMINATION
BY MR. MINAHAN:

The hiring of labor in the plant is my responsibility only indirectly. I supervise the department that hires personnel. We have approximately 650 employees in our production department at the present time. The Algoma Plywood and Veneer Company is the largest employer of labor in Al-

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goma, Wisconsin. Algoma is a city of approximately 3,000 or 3,200 people.

58 EXHIBIT 1 (Postcard dated January 7, 1947 from Financial Secretary of Local 1521 to Victor Moreau) (Omitting formal parts)

You are in arrears with your dues. Please take care of these on or before Monday, Jan. 13 or this will be your last day at work and you will also be fined $1.00.

80 Article I. EXHIBIT 5 (Agreement) (Omitting formal parts)

* * *

The Company recognizes the Union as the exclusive bargaining representative of the Company's employees in its Algoma, Wisconsin, plants exclusive of administrative, executive, supervisory and office employees. The terms of this agreement shall be limited in its coverage to such employees. All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing.

* * *

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106 MOTION (Omitting formal parts)

Now comes the Intervenor, LOCAL 1521, CARPENTERS & JOINERS, A. F. of L., by PADWAY, GOLDBERG & PREVIANT, its attorneys, and moves the Board to dismiss the Petition of the Complainant herein for the reason that this Board does not have jurisdiction of the subject matter of said Petition. That the authority for this motion is *Bethlehem Steel Company vs. New York Labor Board, U. S. Supreme Court, April* 7, 1947, 19 L. R. R. M. 2499, and 12 Labor Cases, Paragraph 51,245.

Dated at Milwaukee, Wisconsin, this 30th day of April, 1947.

107 LETTER (dated May 2, 1947 to Saul Cooper from Secretary of Wis. Employment Rel. Board) (Omitting formal parts)

Your motion filed on behalf of the Intervenor, Local 1521, Carpenters & Joiners, A. F. of L. requesting the Board to dismiss the complaint in the above entitled matter was received by the Board on May 1, 1947. Prior to receipt of this motion and on April 30, 1947, the Board issued and mailed to the parties its Findings of Fact, Conclusions of Law and Order in the case. The Board has directed me to advise you that said Order stands as their answer to your motion.

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118-121 JUDGMENT (Omitting formal parts)

118 The above entitled matter having come on for hearing on the 23rd day of June, 1947 before the court without a jury upon the return of the Wisconsin Employment Relations Board, Beatrice Lampert Assistant Attorney General, appearing for the petitioner, Roger C. Minahan of Whyte, Hirschboeck & Minahan appearing for the respondent, Saul Cooper of Padway, Goldberg & Previant appearing for the United Brotherhood of Carpenters & Joiners of America, Local 1521 and Donald J. Martin appearing for Victor Moreau, and the court having heard the arguments and considered the briefs of counsel and being fully advised in the premises and having taken the matter under advisement and having on the 4th day of November, 1947, filed its decision and direction for judgment,

Now, Therefore,

IT IS ADJUDGED AND DECREED that the order of the Wisconsin Employment Relations Board entered on the 30th day of April, 1947 in the matter of Victor Moreau, R. #1, Algoma, Wis. represented by J. J. Gray, 6138 Plankinton Building, Milwaukee, Wis., Complainant v. Algoma Plywood and Veneer Company, Algoma, Wisconsin, Respondent, Case II, No. 1565 Ce-222, Decision No. 1291 be and the same is hereby modified by strik-

119 ing therefrom the paragraph therein numbered as subsection (b) of section 2 of said order requiring

the respondent to make whole Victor Moreau for loss of pay and that the said order as so modified be and it hereby is confirmed and enforced.

IT IS FURTHER ADJUDGED AND DECREED that the Algoma Plywood and Veneer Company, its officers and agents shall immediately:

1. Cease and desist from

(a) Encouraging membership in Local No. 1521, Carpenters & Joiners of America, affiliated with the American Federation of Labor by discriminating in any manner with the hire or tenure of its employes whether they are or are not members in good standing in such labor Union.

(b) Encouraging membership in Local No. 1521, Carpenters and Joiners of America, or any other labor organization, by requiring as a condition of employment that any employe become or remain a member of any such labor organization, as a condition of employment unless and until the employes approve such provision by a referendum as provided in Section 111.06 (1) (c) of the Wisconsin Statutes.

2. Take the following affirmative actions which the Board finds will effectuate the policies of the Act:

(a) Offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to his seniority or other rights or privileges.

(b) Post at its plant at Algoma, Wisconsin, copies of the notice attached hereto marked Exhibit A. Copies of said notice shall be prepared by the said Algoma Plywood & Veneer Company, signed by the said company's representative and posted by the said company immediately upon receipt of a copy of this order, and maintained by it for thirty (30) consecutive days thereafter in conspicuous places, including all places where notices to employes are customarily posted.

(c) Notify the Wisconsin Employment Relations Board in writing within five (5) days from the date of receipt of a copy o fthis judgment what steps the company has taken to comply therewith.

Dated November 21, 1947.

BY THE COURT

Edward M. Duquaine

Circuit Judge

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121

EXHIBIT A

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Board, we hereby notify our employes that we will not in any manner interfere with their rights to self-organization and to form, join or assist any labor organization of their choice. That we will not require any of our employes to become or remain members of Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, or any other labor organization as a condition of employment; that we will not enforce or attempt to enforce any provision contained in any written collective bargaining agreement between our company and Local No. 1521, Carpenters and Joiners of America, affiliated with the American Federation of Labor, which requires as a condition of employment that all employes who were members of such union on the 5th day of April, 1946, or have since become members of such union, must maintain their membership in good standing; we will offer to Victor Moreau immediate and full reinstatement to his former, or substantially equivalent, position without prejudice to any seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of such discrimination.

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All of our employes are free to join or assist labor organizations of their choice, or to refrain from such activities. All of them are free to become and remain members of Local 1521, Carpenters and Joiners of America, or any other labor organization, or to refrain from any organizational activities. We will not discriminate in regard to hire, or tenure of employment or any term or condition of employment against any employe because of membership in or activities on behalf of any labor organization, or the failure to maintain membership in any labor organization.

ALGOMA PLYWOOD AND
VENEER COMPANY
By .....

109-113 DECISION (Omitting formal parts)

109 Victor Moreau, an employee of Algoma Plywood and Veneer Company, ceased his employment with the company when the matter of the enforcement of the "maintenance of membership" clause of the labor contract existing between the company and the United Brotherhood of Carpenters and Joiners, Local No. 1521 (AFL) was raised. He was then a member of the union and had been since before the contract was made. He brought proceedings before the Wisconsin Employment Relations Board against the company, his complaint of an unfair labor practice being

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predicated on the proposition that he was discharged pursuant to the maintenance of membership clause in the contract which was invalid under Wisconsin law because not ratified by the employees in accordance with sec. 111.06 (1) (c). The union intervened in the proceedings.

The Board found with Moreau, entering the usual order in such case requiring the employer to reinstate him with back pay less his earnings elsewhere.

The Board has petitioned under sec. 111.07 (7) for enforcement of the order. The company and the union have petitioned for a review of the said order under sec. 111.07 (8) and Chapter 227 of the Statutes.

110 In my opinion each and every finding of fact of the Board is supported by credible and competent evidence or by reasonable and proper inferences from the established facts and, therefore, may not be disturbed. *Retail Clerks Union v. WERB,* 242 Wis. 21. As to the contention of the company and the union that Moreau voluntarily quit his job, I do not perceive how the evidence may be considered as warranting any conclusion other than that drawn by the Board.

The company and the union both take the position that under the Bethlehem Steel Company Case the National Labor Relations Board and not the WERB had jurisdiction. I consider that the question of jurisdiction must be resolved in favor of the Wisconsin Board under the decision of our

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Supreme Court in *International Union v. WERB*, 250 Wis. 550. The opinion in that case considers the limits of the Bethlehem Steel Company decision.

I think clearly that the contract effective April 29th, 1946, and which was the current contract when Moreau's employment ceased must stand on its own feet as a new contract and that validity of the maintenance of membership clause may not be sustained on the theory that the clause was valid when it originally became a part of the annual labor contract. Each renewal constituted a new contract.

As to the conclusions of law, the difficulty I find is in sustaining that part of Conclusion of Law No. 3, which recites that the termination of Moreau's employment, which was brought about by reason of his failure to maintain membership in the union, "constituted discrimination by the company in regard to the hire or tenure of employment of said Victor Moreau," insofar as such discrimination may be taken as sufficient justification for the back pay order.

After this case was argued and briefs were filed, the Court asked for further briefs covering the question of whether Moreau's membership in the union when the contract was made affected his right to the relief granted by the Board. This question was submitted on the assumptions (1) that Moreau was a member of the union in good

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standing when the contract dated April 5th, 1946, was made; (2) that the presence of the clause in the contract resulted from the demand of the union with the acquiescence of the company; (3) that Moreau's severance of employment would not have occurred were the clause not in the con-
111 tract, but on the other hand resulted from the terms of the clause being carried out; and (4) that the company's participation in the execution of the clause was only such as its good-faith observance of the terms of the clause required. Those assumptions are undoubtedly true.

In *International Union, Etc., v. WERB*, 245 Wis. 417, Bezie, the complainant, was an old employee and was a member of an AFL union. The company entered into a contract with a CIO union which provided that new employees at the end of the probationary period be required either to join the union or secure a working permit, and that old employees, such as Bezie, who were not members of the CIO union secure a working permit. Bezie was discharged for not being either a member of the CIO union or securing a working permit. The Court said, at page 432:

> "The contract provides that employees who were members of the union at the time it was entered into should retain their membership and keep in good standing in the union, which implies payment of dues, or be discharged. This certainly encourages membership in the union."

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At page 434 the Court said:

> "We consider also that the inference that the union as the bargaining agent induced the company to make the contract is warranted. Obviously the contract is to the advantage of the union and of its employee members. This being so it is a fair inference that the bargaining committee initiated the negotiations for the provision. The board was thus warranted to find interference by the union with the right of Bezie and other employees to refrain from becoming members of the union or assisting its activities by taking out a permit, and by so doing the union committed an unfair labor practice."

It is to be noted that in the last cited case the complaining employee, Bezie, was not a member of the union with which the labor contract was made, which union together with the employer were held to be guilty of an unfair labor practice by reason of the existence in the labor contract of a maintenance of membership clause.

Since the maintenance of membership clause in the contract is invalid, the authority of the Board to restore Moreau to his employment is clear. Whether restoration should include visiting a penalty on the employer in the form of a back pay provision presents a different question.

In *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569, the Court said:

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112 "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes * * *"

It is difficult to see where the employer in the instant case gained any advantage. In this connection certain allegations of the employee contained in the memorandum accompanying the complaint are of interest. It is there stated:

"Both Mr. Yerkes and Mr. Fulwiler admitted that the maintenance of membership clause was illegal, but stated that it had been ordered on them by the War Labor Board against their wishes and that we could rest assured that when the contract again came up that this matter would be settled by the Wisconsin Employment Relations Board. Mr. Yerkes' position was that he was caught between two fires; that he either had to violate the laws of the State of Wisconsin or violate his contract, and that he preferred that this matter be referred to the Wisconsin Employment Relations Board for determination."

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Among the cases relied upon by the Attorney General to support the Board's order in full are *Sperry-Gyroscope Co. v. National Labor Relations Board*, 129 Fed. 2d 922, *National Labor Relations Board v. Empire Worsted Mills, Inc.*, 129 Fed. 2d 668, and *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al*, 315 U. S. 685, 691, 62 S. Ct. 846, 10 L. R. R. 204. In each of these cases a company-dominated union was involved. Good reason exists why an employer dealing with a company-dominated union should not be permitted to set up any of the terms of a labor contract by way of defense to the enforcement of the law and the imposition of the usual penalties. The union here, however, is not a company-dominated union. No reason exists why the company should be held wholly to blame for the existence of the maintenance of membership clause, while members of the union who were members in good standing at the time the contract was made should be completely relieved from any responsibility.

Counsel for the union, while insisting that jurisdiction over the unfair labor practice here involved resided with the national Labor Relations Board and not with the WERB, had this to say
113 in his brief with respect to the back pay order of the Board:

> "Assuming, but not admitting, that Chapter 111 of the Wisconsin Statutes is applicable, then the Board erred in awarding back pay since the claimant should not be permitted to benefit by

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his own recission of the contract of employment. The Board cannot declare the contract unenforceable and in the next breath award Moreau the emoluments of the same contract. By doing so it is permitting an award to the employee for the accomplishment of a contract at the request of his own agent, in which the employer acceded. Under these circumstances such an award would not accomplish the purpose of the Wisconsin Employment Peace Act."

In *Folding Furniture Works v. Wisconsin Labor Relations Board*, 232 Wis. 170, the Court says:

"It was held under the National Labor Relations Act that back pay cannot be ordered as a reward to employees, but only as a penalty against the employer as a means of preventing unfair labor practices. *National Labor Relations Board v. Carlisle Lumber Company* (9th Cir.) 99 Fed. 2d 533. Back pay may not be ordered under the rule of that case unless such order will effectuate the policies of the National Labor Relations Act. * * * The ruining of business enterprises and the confiscation of their plants is not the policy of the Wisconsin Labor Relations Act."

None of the counsel for the respective parties has cited any case that might be considered as directly ruling the point here involved. I consider that under the equities of this case it cannot be considered that back pay "will effectuate the policies" of the State Act. Fault for the retention of the clause in the contract must as a matter of

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realism be attributed principally, if not wholly, to the union. This union was Moreau's union. He was a dues-paying member when the contract was signed. The union agents were his agents. The order of the Board insofar as it orders back pay imposes a penalty on the employer, whose fault in the premises is little, if any, compared to that of the union. I do not consider that the Board had authority in this case to include in the order paragraph 2 (b), which reads:

> "Make whole Victor Moreau for any loss of pay that he may have suffered by reason of the company's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned in wages during the period from the date of his discharge to the date of the company's offer of reinstatement, less the net earnings and unemployment compensation he may have had during such period."

The order of the Board will be modified by striking therefrom said paragraph 2 (b); otherwise, it will be affirmed.

114

Dated this 4th day of November, 1947.

By the Court,

EDWARD M. DUQUAINE s/
Circuit Judge.

And afterwards to-wit: on the 14th day of April, A. D. 1948, the same being the 56th day of said term; the following proceedings were had in said cause in this Court:

Wisconsin Employment Relations Board,
Plaintiff,
vs.
Algoma Plywood and Veneer Company,
Defendant.

Kewaunee Circuit Court

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Beatrice Lampert, Assistant Attorney General, and Donald J. Martin, Esq., for the said plaintiff and appellant, and by Roger Minahan, Esq., for the said defendant and respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards to-wit: on the 11th day of May, A. D. 1948, the same being the 64th day of said term; the judgment of this court was rendered in words and figures following, that is to say:

Wisconsin Employment Relations Board,
Plaintiff,
vs.
Algoma Plywood and Veneer Company,
Defendant.

Kewaunee Circuit Court.

Opinion by Justice Wickhem.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

And that this cause be, and the same is hereby, remanded to the said Circuit Court for the entry of judgment in accordance with the opinion.

Thereupon the opinion of the Court by JUSTICE WICKHEM was filed in words and figures following, that is to say:

STATE OF WISCONSIN IN SUPREME COURT

August Term, 1947

No. 189.

WISCONSIN EMPLOYMENTS RELATIONS BOARD,
Plaintiff,

v.

ALGOMA PLYWOOD & VENEER COMPANY,
Respondent.

FILED MAY 11, 1948
ARTHUR A. McLEOD
Clerk of Supreme Court
Madison, Wis.

Appeals from a portion of the judgment of the circuit court for Kewaunee county, Edward M. Duquaine, circuit judge. *Affirmed* in part and *reversed* in part.

An action was commenced on November 5, 1947 by Wisconsin Employment Relations Board against Algoma

Plywood and Veneer Company to enforce an order theretofore made by the board. The appeal is by the Wisconsin Employment Relations Board from that portion of the judgment which modifies the board's order by striking a provision requiring the employer to pay back pay in addition to reinstating the employee involved.

There is a motion by Algoma Plywood and Veneer Company to review that portion of the order which sustains the jurisdiction of the board. Hereafter the Algoma Plywood and Veneer Company will be referred to as "the company"; the Wisconsin Employment Relations Board as "the board" and Victor Moreau whose rights are under question in this action will be referred to as "the employee." The Carpenters and Joiners, A. F. of L. Local No. 1521 will be referred to as "the union."

The material facts will be stated in the opinion.

WICKHEM, J. The company is a manufacturing concern operating in the city of Algoma and having approximately 650 production workers. In 1942 the union was designated as bargaining agent by a majority of the company's employees in an election conducted by the National Labor Relations Board. Since that time it has entered into contracts with the company concerning wages, hours and working conditions. On April 5, 1946 a contract was executed which contains the following provisions:

"* * * All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing."

This provision had been inserted in the 1943 contract and was included in all contracts thereafter negotiated. It was inserted in the 1943 contract upon the recommendation of a federal conciliator in accordance with an alleged policy of the War Labor Board but no directive of this board was ever issued requiring the inclusion of such a provision. It was the practice in enforcing the provision for the union to notify the company of delinquencies on the part of any employee in respect of his dues. The company would then interview the delinquent employee and take whatever steps were necessary to restore his membership to good standing and failing that would discharge him.

The employee began to work for the company steadily in October, 1945 but had been employed from time to time prior to that time. On one occasion in 1944 he had been reported by the union as delinquent and ordered to leave work but he paid his dues and was restored to this job. Thereafter he maintained his membership until early in 1947 when he received a notice from the union stating that he was in arrears and that if he was not paid up within a week that would "be your last day of work and you will also be fined $1." He did not pay his dues and was ordered to report to the vice-president of the company. He there stated that he would quit before he would pay and indicated dissatisfaction with the union. He was then discharged.

Upon these facts the board ordered that the company cease from encouraging membership in the union by any discrimination in respect of the hire or tenure of its employees or by requiring as a condition of employment that any employee become or remain a member of the union unless and until the employees shall have approved such

provision by referendum under sec. 111.06(1)(c) Stats. The company was required to take the following affirmative action: (1) reinstate employee; (2) pay employee a sum of money equal to the amount he normally would have earned in wages during the period from his discharge to the date of the company's order of reinstatement, less earnings he may have had during such period; (3) post the usual notices; (4) notify the board within five days of the steps taken to comply with the order.

Thereafter, on November 5, 1947 the board petitioned the circuit court for enforcement of its order and the judgment in this case reversed that portion of the order requiring the company to make the employee whole for loss of pay. Otherwise the order was confirmed and enforced. Both union and employer contend that the board was without jurisdiction for the reason that the National Labor Relations Board in supervising the election for bargaining agent and certifying the union as such had so intervened in the labor relations of the company as to oust the Wisconsin board of jurisdiction.

As pointed out in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, 237 Wis. 164, 295 N. W. 791 we are again confronted with a question of delicacy and difficulty concerning "the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction." See also *International B. of E. W. v. Wisconsin E. R. Board*, 245 Wis. 532, 15 N. W. (2d) 823. The question first came before this court in *Wisconsin Labor R. Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673. At that time there was in force in this state a labor relations act substantially identical to

all important respects with the Wagner Act. The question was whether the Wisconsin Board had jurisdiction to consider and to determine proceedings initiated under the Wisconsin Act by employees charging unfair labor practices on the part of an employer. This court held that the state had power to regulate labor relations in the interest of the peace, health and order of the state and that the federal government had the power to "regulate this relationship to the extent that unregulated it tends to obstruct or burden interstate commerce." It was conceded that in the field where there was an overlapping of jurisdiction the federal power was supreme and that the federal statute could preempt this field. It was held, however, that the National Labor Relations act had not preempted the field and in view of the discretion in the National Labor Relations Board to take or to refuse jurisdiction in accordance with its determination whether the situation proximately affected Interstate Commerce it was held that the state was ousted of jurisdiction only where there was an administrative conflict created by the intervention of the National Labor Relations Board. It was unnecessary to determine what the situation might be if the state act had been in any way repugnant to the policy and purposes of the National Act. The *Rueping* Case did not involve any intervention by the National Labor Relations Board and this court did not consider what would constitute such an administrative intervention by the National Board as would oust the Wisconsin Board of jurisdiction. The *Allen-Bradley Case*, supra, arose under the Wisconsin Employment Peace Act which was different in several important particulars from the so-called Little Wagner Act. Among other things it defined unfair labor prac-

tices by employees and in several other respects departed from the provisions of the former statute. It was contended in the *Allen-Bradley* Case that the Wisconsin Employment Peace Act was repugnant to the purpose and policy of the National Labor Relations Act and that for that reason it could not be enforced in the face of the federal enactment. It was held that at least so far as unfair labor practices by employees was concerned the Employment Peace Act covered a field not dealt with by the national act or within the jurisdiction of the National Labor Board and that there was no conflict fatal to the jurisdiction of Wisconsin. It was intimated that mere repugnancy in the language of the two acts did not go to the matter of jurisdiction and that there could be no conflict even in such a situation until it was attempted to apply them to the same labor dispute. The *Allen-Bradley* Case was appealed to the United States Supreme Court and was affirmed. *Allen-Bradley Local v. Board,* 315 U. S. 740. The opinion was put upon quite narrow grounds and the court deliberately avoided the question whether the Wisconsin view that jurisdiction was wholly dependent upon administrative conflict was valid. It was held, however, that a state law so construed and applied as to delete, impair or defeat the rights declared by the National Labor Relations Act would be unconstitutional but it was held that the court would not consider the state ct as a whole but rather the parts of it applied in the case involved and that the conflict with the federal act must be found in those very parts. It was held that since the federal act did not govern employer-union activity of the type involved in the *Allen-Bradley* Case the portions of the Wisconsin Act under attack constituted a valid exercise of

jurisdiction. It was stated that if the order of the state board had affected the status of employees or caused a forfeiture of collective bargaining rights a different question would arise.

We now come to the case of *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026. That case dealt with a situation in which the New York State Labor Board had permitted foremen to organize to constitute a collective bargaining unit. The question whether foremen should consistently with the policy of the national act be organized as a bargaining unit had had various solutions by the national board. In the beginning it had recognized the rights of the foremen and "later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foreman organization units." The application of the foremen to the state board was the result of this policy on the part of the national board. Later during the pendency of the case in the courts of the state of New York the Supreme Court in *NLRB v. Packard Motor Car Company*, 330 U. S. 485, 67 S. Ct. 789 had held that the national act entitled foremen to the rights of self-organization under the act. The court in the *Bethlehem* Case follows the decision in the *Allen-Bradley* Case to the effect that in the national act congress has "sought to reach some aspects of the employer-employee relation out of which such interferences arise. . . . Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under

compulsion of the state," citing the *Allen-Bradley* Case. It was held, however, following the case of *Hill v. Florida*, 325 U. S. 538, 65 S. Ct. 1373 that "the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." The court concluded that where Congress has implemented the act by the delegation of rulemaking power to an administrative body and where that body in the exercise of its delegated power has adopted a rule of policy the state power is abrogated, at least so far as the subject matter of the rule is concerned. While the state regulation in some fields may be invalid even though a particular phase of the subject has not been covered by rule it was held that where the measure in question relates to what might be considered a separate or distinct segment of the matter, the states are generally permitted to exercise their police power as to the matters omitted by the administrative rules. It is said, however, that "the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." The court points out that the failure of the National Labor Relations Act to entertain the foremen's petitions was of the latter class; that the board had never denied its jurisdiction over the petitions and had made it clear that its refusal to designate foremen's bargaining units "was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes." The court then says:

"The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. . . . We do not believe this leaves room for the operation of the state authority asserted."

This court was called upon in *International Union v. Wisconsin E. R. Board*, 250 Wis. 550, 28 N. W. (2) 254 to appraise the effect of the Bethlehem Case. We there concluded that the *Bethlehem* Case had simply held that the National Labor Relations Board in the instant Case "had exercised the jurisdiction delegated to it under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been." We adhere to this determination. The *Bethlehem* Case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise. See "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," Russel A. Smith, 46 Michigan Law Review 593 at 609 where in commenting upon the *Bethlehem* Case it is said:

"On its facts the case is easily understood simply as an application of the doctrine that state regulation cannot be permitted to frustrate national policy—in this situation a

policy definitely adverse to foremen unionization, not merely neutral in the matter."

We next consider the consequences of the fact that the union here had been certified as a collective bargaining unit by the National War Labor Board. This circumstance was not present in the *Rueping* or *Allen-Bradley* Cases or *Hotel & R. E. I. Alliance v. Wisconsin E. R. Board*, 236 Wis. 329, 294 N. W. 632, 295 N. W. 634. In the *International B. of E. W.* Case, the National Labor Relations Board had dismissed a petition for investigation and certification of bargaining representative and we there held that the board had not taken jurisdiction. *International Union v. Wisconsin E. R. Board*, supra, involved a question of unfair labor practices by employees who were members of a union which had been certified as a bargaining unit by the National Labor Relations Board. This case also involves such a certification and the question is whether there was such an intervention by the National Board as even under the doctrine of the *Rueping* Case would oust the state and the state board of all jurisdiction concerning the employment relations of this company. We assumed a negative answer in the *International Union* Case, supra, without any discussion of the point. Upon consideration we adhere to the view that the mere certification of a union as a bargaining unit in a particular plant is not such a general assumption of jurisdiction over all of the employment relations of the company as would oust the state board of all jurisdiction. We refrain from expressing any opinion as to the extent to which it does oust the state board in the field that might be regarded as collective bargaining. In other words the ques-

tion reserved by the United States Supreme Court in the *Allen-Bradley* Case as to the consequences there had the board's order effected a forfeiture of collective bargaining rights will not be discussed because it is not involved. It remains to be considered, however, whether the fact that the contract was originally entered into as a result of collective bargaining supervised by the National War Labor Board and the clause under attack here inserted at the recommendation or insistence of a conciliator of the board and in accordance with a general policy not formalized by rule or directive brings the case within the rule of the *Bethlehem* Case as we have construed it. The question presents some difficulty but we have concluded that it does not have this effect. In *International B. of E. W.* Case this court held that sec. 8 (3), 29 USCA 158(3) had not validated or authorized an all-union agreement. As we construed the statute in the light of its language and the committee report accompanying it the section simply makes it clear that an all-union contract negotiated by a representative of the employees is not repugnant to the purposes of the National Act. It was not intended to interfere with the policy of the various states in respect of closed shop and all-union agreements. Under the circumstances we are of the opinion that there was not delegated to either the War Labor Board or to the National Labor Relations Board any jurisdiction to declare a policy in respect of maintenance of membership, closed shop or all-union shop and that even if the War Labor Board had issued a formal directive it would be *ultra vires* the board and have no effect upon the jurisdiction of the Wisconsin Board, unless, indeed, it fell within some aspect of the war power, a matter which we have not in-

vestigated and which is not briefed but which is not material for the reason that the contract was renegotiated after the war powers if any there were had ended. In connection with this point see *International B. of P. M. v. Wisconsin E. R. Board*, 245 Wis. 541, 15 N. W. (2) 823.

The next question has to do with the portion of the orders requiring the employer to make the employee whole for loss of pay resulting from his discharge. The trial court held that in this case the board abused its discretion and ordered the provisions for back pay to be deleted from the order. The statute involved in sec. 111.07(4) which authorizes the board to take the following remedial action:

"* * * Final orders may * * * require the person complained of to cease and desist from the unfair labor practices found to have been committed * * * and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper . . ."

It was held by this court in *Folding Furniture Works v. Wisconsin L. R. Board*, 232 Wis. 170, 285 N. W. 851 in the course of reversing an order held to be excessive in amount that "we consider that requiring an offer to reinstate the men was proper, and an order for payment of a reasonable amount of back pay, to those who accepted the offer, based upon what was deemed necessary to 'effectuate the policies' of the act, would have been proper." It was further stated that the order for back pay is not a reward to employees but is penal and remedial for the purpose as stated by the United States Supreme Court in *Consolidated Edison Co. v. National Labor Relations Board* of removing or avoiding the consequences of violation where those consequences

are of a kind to thwart the purposes of the act." In the *Folding Furniture Co.* Case the award was reversed because it involved many employees and the enormity of the award would tend to bankrupt the employer rather than to induce compliance with the act.

We deal here with a matter committed by statute to the discretion of the board and in order to reverse we must find that the order had no reasonable tendency to effectuate the purposes of the act. In this connection see *Christoffel v. Wisconsin E. R. Board*, 243 Wis. 332, 10 N. W. (2d) 197; *Appleton Chair Corp. v. United Brotherhood*, 239 Wis. 337, 1 N. W. (2d) 188. We are of the view that this cannot be said. A great deal of emphasis is laid by the employer upon the fact that it acted under a certain degree of compulsion in putting the questioned clause into the contract; that in order to conduct its business without labor troubles it was prudent to yield to the demand of the union which was supported by the federal conciliator. It must be at once apparent, however, that if that operates as such a complete excuse for committing an unfair labor practice as to make the ordering of back pay improper the employer may in the future yield with impunity to such pressures. What the board has done is to impose such penalty as would in its judgment be likely to retard the employer's inclination to yield to this compulsion in the future. We cannot say that the board might not reasonably consider that its action would tend to effectuate the policy of the act. It is also contended that it is unfair to visit the entire consequences of the situation upon the employer. However, the term "backpay" in its ordinary sense and as used in the statute clearly indicates that its source is the employer and that it

is not an appropriate penalty to visit upon the union. We think that this objection is without validity.

It follows that the judgment of the trial court should be affirmed in so far as it sustains the jurisdiction of the board and reversed with directions to enforce the portion of the board's order dealing with back pay.

By the Court.—Judgment affirmed in part and reversed in part and cause remanded for the entry of judgment in accordance with the opinion.

STATE OF WISCONSIN
IN SUPREME COURT.

Wisconsin Employment Relations Board,
Plaintiff,

vs.

Algoma Plywood and Veneer Company,
Defendant.

I, ARTHUR A. McLEOD, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Madison, this 21st day of July, A. D. 1948.

ARTHUR A. McLEOD
Clerk of Supreme Court, Wisconsin.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 11, 1948.

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is assigned for hearing immediately following Nos. 38 and 39 which are assigned for hearing immediately following Nos. 14 and 15.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the

Supreme Court of the United States

October Term, 1947

No. 216

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN, AND BRIEF IN SUPPORT THEREOF

ROGER C. MINAHAN,
VICTOR M. HARDING,
Counsel for Petitioner.

THE GILMAN PRESS, MADISON, WIS.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

To the Honorable The Supreme Court of the United States.

Your petitioner, Algoma Plywood and Veneer Co., respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This is a proceeding to review an order of the Wisconsin Employment Relations Board (R. p. 8). That Board found the Petitioner (Algoma Plywood and Veneer Co.) had committed an unfair labor practice, under Sec. 111.06 (1) (c) of the Wisconsin Statutes, in discharging a certain employee on January 14, 1947, pursuant to a union

security provision contained in a labor contract negotiated between Petitioner and Local Union No. 1521, Carpenters and Joiners of America (AFL). (R. p. 7-8). This Union had previously been certified as bargaining agent of Petitioner's employees by the National Labor Relations Board (R. p. 19). The Wisconsin Employment Relations Board ordered Petitioner to reinstate the discharged employee, with back pay, and to cease and desist from carrying out the union security provision of its labor contract on the ground that such provision contravened the Wisconsin statutes (R. p. 8-9).

II.

BASIS OF JURISDICTION TO REVIEW

The basis upon which this court has jurisdiction to review the judgment of the Wisconsin Supreme Court is Sec. 237 (b) of the Judicial Code, in that the validity of Sec. 111.06 (1) (c) of the Wisconsin Statutes, in its application to Petitioner, is drawn in question on the ground that it is repugnant to Sec. 8 (3) and Sec. 10 (a) of the National Labor Relations Act (29 U. S. C. A. 158 and 160). The jurisdiction of the State Board in this case was challenged at every stage of the proceedings, originally by motion to the State Board (R. p. 40), and at each subsequent stage by assignment of error. (See statements in opinions of Circuit and Supreme Court, R. p. 46; 56).

III.

QUESTON PRESENTED

Does the Wisconsin Employment Relations Board have jurisdiction of unfair labor practice charges against an employer in interstate commerce, when Congress has regulated the same conduct through the National Labor Relations Act, and when the National Labor Relations Board has previously asserted its jurisdiction over the employer's labor relations in representation proceedings?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(a) *The Wisconsin Supreme Court hds decided a federal question of substance in a way probably not in accord with applicable decisions of this court.*

The applicable decisions of this court are:

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767

Hill v. Florida, 325 U. S. 538.

(b) *The Wisconsin Supreme Court has decided a federal question of substance not theretofore determined by this court.*

In deciding that the Wisconsin Employment Relations Board has jurisdiction over unfair labor practice charges against an employer engaged in interstate commerce, in spite of Sec. 10 (a) of the National Labor Relations Act which makes the National Board's jurisdiction in this field

exclusive, the Wisconsin Supreme Court has decided a federal question of substance, not heretofore determined by this court.

(c) *The Wisconsin Supreme Court has decided an important federal question, not heretofore determined by this court, directly contrary to a decision on the same question by another state supreme court.*

In *International Brotherhood of Teamsters v. Riley*, 59 A² 476, decided by the New Hampshire Supreme Court on June 1, 1948, that court reached the conclusion that a state law regulating union security contracts could not be enforced against an employer in interstate commerce, since the field of the employer's labor management relations had been pre-empted by the National Act.

(d) In the case of *La Crosse Telephone Corp. v. Wis. Employment Relations Board*, Case No. 701 in the October 1947 docket of this court, an appeal is presently pending which involves a related subject, namely whether the State Board has jurisdiction to conduct a representation proceeding at a company in interstate commerce where the National Board has never exercised its jurisdiction over the company. The instant case presents a question not involved in the La Crosse case, since in this case the National Board had exercised jurisdiction respecting the labor relations of the parties.

The instant case should be considered in conjunction with the La Crosse case and this merits the granting of the writ in this case.

V.

PRAYER FOR WRIT OF CERTIORARI

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of the Supreme Court directed to the Wisconsin Supreme Court commanding that court to certify and send to the Supreme Court a full and complete transcript of the record and of the proceedings of the said Wisconsin Supreme Court in the case numbered and entered in its docket, No. 189, August Term, 1947, *Wisconsin Employment Relations Board, Plaintiff, vs. Algoma Plywood & Veneer Co., Defendant*, to the end that it may be reviewed and determined by the Supreme Court, as prescribed by the statutes of the United States; and that the judgment entered therein on May 11, 1948 be reversed and that petitioner have such further relief as may be proper.

Dated, Milwaukee, Wisconsin, July 31, 1948.

ALGOMA PLYWOOD & VENNER CO.,
a corporation,

Petitioner,

By Roger C. Minahan
Victor M. Harding,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of Courts Below

The opinion of the Wisconsin Supreme Court is reported in 252 Wis. 549, 32 NW 417.

The opinion of the Circuit Court of Kewaunee County, Wisconsin, is not officially reported, but appears in 14 Labor Cases (C. C. H.) No. 64,253.

II.

Jurisdiction

1. The date of the final judgment to be reviewed is May 11, 1948. The mandate was issued May 11, 1948.

2. The statutory provision which is believed to sustain the jurisdiction of the Supreme Court is Sec. 237 (b) of the Judicial Code (28 U. S. C. §344(b)), which authorizes this court to review the final judgment of the highest court of a State where there is drawn in question the validity of a State statute on the ground of its being repugnant to a federal statute.

III.

Statement of the Case

Algoma Plywood & Veneer Co. is engaged in the manufacture of plywood and veneer at Kewaunee, Wisconsin. About 95 per cent of its product is sold in interstate commerce (R. p. 24). Following a bargaining election conducted in 1942 by the National Labor Relations Board at the Algoma plant, Local 1521 of the Carpenters and Joiners Union (A. F. L.) was certified as bargaining agent and the Company thereafter dealt with it as the bargaining representative of all production employees (R. p. 19, 56).

In 1943 the Company and the Union negotiated a contract containing a provision requiring members of the Union to maintain their membership as a condition of employment, without an election conducted by the Wisconsin Employment Relations Board (R. p. 19-20, 56). The same provision appeared in succeeding contracts. A union member, Moreau, failed to pay his dues and at the Union's demand was discharged by the Company in January, 1947. Moreau filed a complaint against the Company with the Wisconsin Employment Relations Board (R. p. 12), and the Company was charged by the Board with a violation of Sec. 111.06 (1)(c) of the Wisconsin Statutes, the applicable portions of which provide:

> "It shall be an unfair labor practice for an employer —to encourage—membership in any labor organization —by discrimination in regard to hiring, tenure or other terms of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds

of such employees voting—shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board—."

The Wisconsin Employment Relations Board found that the Company had committed an unfair labor practice in violation of the state statute and ordered the Company to reinstate Moreau and to cease and desist from giving any effect to the maintenance of membership provision of its labor contract without a two-thirds vote of its employees (R. p. 7-10).

The case was then carried for review to the Circuit Court of Kewaunee County where both the Company and the Union contended that the State Board was without jurisdiction to deal with unfair labor practice charges against the Company (R. p. 46), since not only did Sec. 10 (a) of the National Labor Relations Act make the National Board's jurisdiction "exclusive," but also the National Board had already pre-empted the field of the Company's labor relations by conducting a certification proceeding out of which the labor contract and maintenance of membership provision evolved.

The Circuit Court decided the federal question against the Company and the Union (R. p. 46-7) and its judgment on this aspect of the case was affirmed by the Wisconsin Supreme Court on May 11, 1948 (R. p. 55-56).

Another point in the case was whether the Company should be required to reinstate Moreau with or without back pay. This question is not involved in the Petition for Writ of Certiorari.

IV.

Specification of Errors

1. The court below erred in holding that the State Board may take jurisdiction of an unfair labor practice case against an employer in interstate commerce, in spite of Sec. 10 (a) of the National Labor Relations Act which makes the National Board's jurisdiction in this field exclusive.

2. The court below erred in holding that the State law was not repugnant to the National law, when the state law makes a maintenance of membership provision illegal without a two-thirds vote of employees, whereas the National Act provides that nothing in that Act shall preclude an employer from entering into such a provision with the union representing his employees.

3. The court below erred in holding that the representation proceeding conducted at the Company's plant by the National Board did not oust the State Board of jurisdiction over the Company's labor management relations.

V.

Argument

1. *Sec. 10 (a) of the National Labor Relations Act, which makes the National Board's power to prevent unfair labor practices exclusive* (29 U. S. C. A. par. 160), *makes inapplicable to employers in interstate commerce any state law dealing with employer unfair labor practices.*

In this case the employer is charged with the commission of an unfair labor practice under state law, which would not be an unfair labor practice under the National Act. The alleged unfair labor practice is the employer's adherence to a maintenance of membership provision in his labor contract, a practice which is clearly not an unfair labor practice under the National Act. Thus, the effect of the State Board's order in this case, requiring the employer to cease and desist from observing this provision of his contract, is to encroach upon the domain of the National Board whose jurisdiction is expressly made *exclusive* by Act of Congress.

The application of Section 10 (a) of the National Labor Relations Act to State Unfair Labor Practice Laws has not been passed upon by this court, and warrants the granting of the Writ in this case.

2. *Sec. 111.06 of Wisconsin Statutes is inconsistent with Sec. 8 (3) of the National Labor Relations Act and is, therefore, unenforceable against an employer in interstate commerce.*

Sec. 8 of N. L. R. A. (29 U. S. C. A. par. 158) defines employer unfair labor practices and provides at subsection (3):

> "Provided that nothing in this Act . . ., or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization—to require as a condition of employment membership therein—."

Sec. 111.06 (1) of the Wisconsin Statutes sets forth employer unfair labor practices and at subsection (c) 1 provides:

> "Provided, that an employer shall not be prohibited from entering into an all-union agreement with the representative of his employees in a collective bargaining unit, when at least two-thirds of such employees voting—shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board."

Thus, the National Act says that the employer and union shall be free to enter into an all-union contract, whereas the State Act says that they can only enter into such a contract after a referendum has been held by the State Board at which at least two-thirds of the employees signify their approval.

To illustrate the inconsistency, let us consider actual collective bargaining negotiations between a Wisconsin employer engaged in interstate commerce and a union which has just been certified as the bargaining agent by the National Board. The Union requests the inclusion in the contract of a maintenance of membership provision. The employer is then placed in this dilemma:

1. If he says "yes" (which is what the employer said in this case), then he subjects himself to possible later charges that he has committed an unfair labor practice under State law, since no referendum has first been conducted by the State Board.

2. If he says "no," or "not unless the State Board conducts a referendum and at least two-thirds of the men ap-

prove," then he subjects himself to charges of "refusing to bargain" under the National Act, and the Union may go directly before the National Board and secure an order directing the employer to cease and desist from refusing to bargain.

The National Board would consider such a refusal on the part of an employer as an unfair labor practice, because there is nothing in the National Act which permits an employer to refuse to bargain on such a subject. On the contrary, the National Act contains an express recognition of such a union security provision.

See: *Eppinger & Russell Co.* (1944) 56 N. L. R. B. 1259

Tampa Electric Co. (1944) 56 N. L. R. B. 1270.

We submit that an employer should not be placed in such a dilemma by the existence of State and National laws which do not coincide. If the employer in this case had taken the other horn of the dilemma and refused to bargain with the Union on a union security provision without a state-conducted election, the employer would in all probability have been found by the National Board to have committed a violation of the National Act, and this same question would be presented to this Court in a different way. The question would then be: Is the existence of the State requirement of a referendum a valid defense to an employer who is charged with a refusal to bargain under the National Act?

In this case the employer chose the alternative which would best preserve harmony in his plant. Rather than become involved in a dispute with the Union, the employer chose the course which led to litigation with the State Board.

In whatever way this question comes before this court, however, the inconsistency between the State and National Acts is apparent. In the light of this inconsistency the State Act must yield.

In *Allen Bradley Local v. Wis. Employment Relations Board*, 315 U. S. 740, this court held that the State Act could properly operate in the field of preventing unfair labor practices by *employees*, because the National Act did not attempt to regulate in that field. The court added this significant qualification, at P. 751:

> "If the order of the State Board—caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

Now we have a case where the State Board's order does cause "a forfeiture of collective bargaining rights," since it orders the employer to cease and desist from observing the maintenance of membership provision in its contract with the union until a referendum has been conducted by the State Board and the requisite number of employees approve it. (R. p. 9)

In *Hill v. Florida*, 325 U. S. 543 this court struck down a state statute requiring unions and business agents to secure licenses or permits before functioning as bargaining agents. This law was held to interfere with the right granted to employees by the National Act to freely choose their bargaining agent.

By the same token in this case, the union's right to bargain collectively with the employer, given to it by the National Act, has been circumscribed by the State Act which requires that the State Board shall first conduct a

referendum and two-thirds of the employees must consent, before the Union can bargain collectively on the subject of Union Security.

The failure of the Wisconsin Supreme Court to apply properly the principles of these cases is justification for the granting of the Writ in this case.

3. *The effect of the National Labor Relations Board conducting an election at the Algoma plant and certifying the Union as the bargaining agent, was to oust the State Board of jurisdiction over the labor relations of the parties.*

In *Bethlehem Steel Co. v. N. Y. Labor Board*, 330 U. S. 767, this court held that a State Board could not operate in the field of labor relations of the parties where the National Board had asserted its jurisdiction in the industry in which the employer is engaged. At P. 776 appears this language:

> "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

Thus even though the State Board functioned in a way which was consistent with the policies of the National Board, this court has held that a State Board may not conduct representation proceedings in an industry engaged in interstate commerce.

So here, the National Board took jurisdiction over the labor relations of the Company and the Union in this case

by certifying the Union as bargaining agent (R. p. 19). In the collective bargaining between the parties which followed that certification, the State Board may not interfere.

The Wisconsin Supreme Court's refusal to follow the ruling of this court in the Bethlehem Steel Co. case warrants granting the Writ in this case.

4. *The Supreme Court of New Hampshire has decided the same federal question involved in this case directly contrary to the decision of the Supreme Court of Wisconsin.*

In *International Union of Teamsters, etc. v. Riley*, 59 A. 476, the New Hampshire court held that a New Hampshire statute, requiring an employer referendum by two-thirds to validate a union security clause, was fatally inconsistent with the Taft-Hartley Act which only requires a majority vote of employees. In the language of the Court at P. 479:

> "A comparison of those provisions with those of the Taft-Hartley Law dealing with unfair labor practices (s. 8), demonstrates that the two acts deal with the same subject matter in much the same way. There are, however, many conflicts between the provisions of the Taft-Hartley Act and the Willey Act. . . . In regard to the union shop under which an employer may hire non-union men of his own selection who, after a probationary period of employment must become union members as a condition of further employment, the Taft-Hartley Act permits such agreements when a majority of employees vote in favor of it, while the Willey Bill requires a two-thirds majority to validate such contracts. Numerous other inconsistencies between the two acts are pointed out in the excellent brief of the petitioners.

> "The Constitution of the United States gives Congress jurisdiction over the entire field of interstate commerce, and since Congress has already pre-empted the subject of labor management relations within the field of interstate commerce, it follows from the paramount character of its authority that state regulation of the subject matter is excluded."

The provision of the National Act, Sec. 14 (b), which expressly recognized the validity of state laws prohibiting such union security provisions, was held not to sustain the New Hampshire law because the State law regulated rather than prohibited such provisions.

The instant case involves the National Labor Relations Act before amendment by the Taft-Hartley Act. A fortiori, the New Hampshire Supreme Court would have decided that the New Hampshire Law conflicted with the original National Labor Relations Act since that law, before its amendment, contained no provision recognizing the validity of state legislation in the same field.

To resolve the conflict between the decisions reached by the Wisconsin and New Hampshire Supreme Courts on this federal question, this Court should grant the Writ.

For the foregoing reasons it is submitted that this case is one which calls for the exercise by the Supreme Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the decision of the courts below.

Respectfully submitted,

ROGER C. MINAHAN,
VICTOR M. HARDING,
Counsel for Petitioner.

In the

Supreme Court of the United States

October Term, 1948

No. 216

216

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

On Certiorari to the Supreme Court of the State of Wisconsin

Brief of Algoma Plywood and Veneer Co., Petitioner

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VICTOR M. HARDING,
Counsel for Petitioner.

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I.

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Brief of Algoma Plywood and Veneer Co., Petitioner

II.

Opinions of Courts Below

The opinion of the Wisconsin Supreme Court is reported in 252 Wis. 549, 32 N. W. 2d 417.

The opinion of the Circuit Court of Kewaunee County, Wisconsin, is not officially reported, but appears in 14 Labor Cases (C. C. H.) No. 64,253.

III.

Jurisdiction

1. The date of the final judgment to be reviewed is May 11, 1948. The mandate was issued May 11, 1948.

2. The statutory provision which is believed to sustain the jurisdiction of the Supreme Court is Sec. 237 (b) of the Judicial Code (28 U. S. C. §344(b)), which authorizes this court to review the final judgment of the highest court of a State where there is drawn in question the validity of a State statute on the ground of its being repugnant to a federal statute.

IV.

Statement of the Case

Algoma Plywood & Veneer Co. is engaged in the manufacture of plywood and veneer in Kewaunee County, Wisconsin. Well over 95 per cent of its business is in interstate commerce (R. 24). Following a bargaining election conducted in 1942 by the National Labor Relations Board at the Algoma plant, Local 1521 of the Carpenters and Joiners Union (A. F. L.) was certified by the National Labor Relations Board as bargaining agent and the Company thereafter dealt with it as the bargaining representative of all production employees (R. 19, 56).

In 1943 the Company and the Union negotiated a contract containing a provision requiring members of the Union to maintain their membership as a condition of employment, without an election conducted by the Wisconsin Employment Relations Board (R. 19-20, 56). The

same provision appeared in succeeding contracts. A Union member, Moreau, failed to pay his dues and at the Union's demand was discharged by the Company on January 14, 1947 (R. 24, 25, 30, 31). Moreau filed a complaint against the Company with the Wisconsin Employment Relations Board (R. 12), and the Company was charged by the Board with a violation of Sec. 111.06(1)(c) of the Wisconsin Statutes, the applicable portions of which provide:

> "It shall be an unfair labor practice for an employer * * * to encourage * * * membership in any labor organization * * * by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting * * * shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

The Wisconsin Employment Relations Board found that the Company had committed an unfair labor practice in violation of the state statute and ordered the Company to reinstate Moreau and to cease and desist from giving any effect to the maintenance of membership provision of its labor contract without a two-thirds vote of its employees (R. 7-10).

The Company then appealed to, and the Wisconsin Employment Relations Board filed a petition for enforcement with the Circuit Court of Kewaunee County, Wisconsin, where both the Company and the Union contended that the State Board was without jurisdiction to deal with unfair labor practice charges against the Company (R. 46).

since not only did Sec. 10 (a) of the National Labor Relations Act (29 U. S. C. A. Sec. 160), prior to 1947 amendment, make the National Board's jurisdiction "exclusive," but also the National Board had already pre-empted the field of the Company's labor relations by conducting a certification proceeding out of which the labor contract and maintenance of membership provision evolved.

The Circuit Court decided the federal question against the Company and the Union (R. 46-47) and its judgment on this aspect of the case was affirmed by the Wisconsin Supreme Court on May 11, 1948 (R. 55 et seq.).

Another point in the case was whether the Company should be required to reinstate Moreau with or without back pay. This question is not involved upon this review, but will stand or fall upon the outcome of the jurisdictional question.

V.

Specification of Errors

1. The court below erred in holding that the State Board may take jurisdiction of an unfair labor practice case against an employer in interstate commerce, in spite of Sec. 10 (a) of the National Labor Relations Act which makes the National Board's jurisdiction in this field exclusive. See 29 U. S. C. A. 160 prior to 1947 amendment.

2. The court below erred in holding that the State law was not repugnant to the National law, when the state law makes a maintenance of membership provision illegal without a two-thirds vote of employees, whereas the National Act provides that nothing in that Act shall preclude

an employer from entering into a contract containing such a provision with the union representing his employees.

3. The court below erred in holding that the representation proceeding conducted at the Company's plant by the National Board did not oust the State Board of jurisdiction over the Company's labor management relations, at least in so far as the validity of the contract negotiated between the Company and the Union is concerned.

VI.

ARGUMENT

1. Sec. 10(a) of the National Labor Relations Act, which makes the National Board's power to prevent unfair labor practices exclusive (29 U. S. C. A. sec. 160), makes inapplicable to employers in interstate commerce any state law dealing with employer unfair labor practices.

In this case the employer is charged under state law with the commission of an unfair labor practice, which was not an unfair labor practice under the then applicable provisions of the National Labor Relations Act. The alleged unfair labor practice was the employer's adherence to a maintenance of membership provision in its labor contract, a practice which clearly was not an unfair labor practice under the National Labor Relations Act. Thus, the effect of the State Board's order in this case, requiring the employer to cease and desist from observing this provision of its contract, is to encroach upon the domain of the National Board whose jurisdiction is expressly made *exclusive* by Act of Congress.

The application of Section 10 (a) of the National Labor Relations Act to state laws providing for unfair labor practices of employers has not been passed upon by this court. Without any qualification, that section confers *exclusive* jurisdiction upon the National Labor Relations Board in matters involving unfair labor practices of employers whose activities affect interstate commerce. The exclusive character of the power conferred upon the Board is elaborated by that section expressly to exclude any other means of adjustment or prevention which may be established by agreement, code, *law or otherwise*. No qualification of what type of agreement, code, or law is made and, hence, it must be assumed that Congress intended any such means whether federal, state or otherwise.

The Wisconsin Supreme Court interpreted this section nearly ten years ago in its decision in *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673, (1938) and interpolated therein a restriction upon the exclusive character of the power conferred upon the Board to other federal boards and agencies only, basing its conclusion on the assumption that the clause purported to deal not with the scope of the act but only with the powers and authority of the National Board with respect to its administration. The Wisconsin Supreme Court bases its conclusion upon section 14 (29 U. S. C. A. sec. 164), specifying other federal acts which are to be subordinated to the provisions of the National Labor Relations Act. It also substantiated this view by reference to that part of section 8(3) (29 U. S. C. A. sec. 158), of the National Labor Relations Act which specifies that no provisions of the National Industrial Recovery Act and no other statute of the United States shall preclude certain

acts authorized thereby. It is submitted that this resort to other less broad and sweeping provisions is unjustified except for the purpose of resolving some ambiguity. It is claimed that there is no ambiguity in the provisions of section 10 (a).

Had Congress intended to limit the broad and sweeping exclusive powers conferred upon the National Board it might have done so as it did in the very sections to which the Wisconsin Supreme Court refers. It is therefore submitted that reference to these sections more appropriately supports the argument that this clause was intended to be broad and unlimited and that the limitation used elsewhere was not intended here.

There is such a sound purpose in conferring upon the National Board exclusive power to prevent unfair labor practices by employers engaged in activities affecting interstate commerce that there is no justification in seeking grounds for circumscribing it. Congress no doubt intended that uniform rules and policies should be applied to all competing employers regardless of their location in the United States and that one should not be subjected to discrimination as against others by virtue of any different policies being applied by the respective states.

The United States Supreme Court in *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U. S. 767, 67 Sup. Ct. 1026, —L. ed. — (1947) held that under section 9 (29 U. S. C. A. sec. 159), of the Act relating to determination of bargaining units, the powers of the National Board were exclusive where the employer's activities affected commerce and the National Board had assumed jurisdiction of the labor relations of the parties in general. This court pointed out that there was nothing in that

portion of the Act which indicated whether it was intended to exclude state action and relied upon an implication of exclusion. Here it is unnecessary to find by implication an intention to exclude state action; the act provides that the authority of the National Board is *exclusive*.

2. Sec. 111.06 of Wisconsin Statutes was repugnant to Sec. 8(3) of the National Labor Relations Act and was therefore invalid and cannot be enforced against an employer whose activities affect interstate commerce.

Sec. 8 of N. L. R. A. (29 U. S. C. A. sec. 158) defines employer unfair labor practices and provides at subsection (3):

> "Provided that nothing in this Act * * *, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * *."

Sec. 111.06(1) of the Wisconsin Statutes sets forth employer unfair labor practices and at subsection (c) 1 provides:

> "Provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two thirds of such employees voting * * * shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board."

Thus, the National Act says that the employer and union shall be free to enter into an all-union contract,

whereas the State Act says that they can enter into such a contract only after a referendum has been held by the State Board in which at least two-thirds of the employees signify their approval.

To illustrate the inconsistency, let us consider actual collective bargaining negotiations between a Wisconsin employer engaged in interstate commerce and a union which has been certified as the bargaining agent by the National Board. The Union requests the inclusion in the contract of a maintenance of membership provision. The employer is then placed in this dilemma:

(a) If he says "yes" (which is what the employer said in this case), then he subjects himself to possible charges that he has committed an unfair labor practice under State law, since no referendum has been conducted by the State Board.

(b) If he says "not unless the State Board conducts a referendum and at least two-thirds of the men approve," then he subjects himself to charges of "refusing to bargain" under the National Act, and the Union may go directly before the National Board and secure an order directing the employer to cease and desist from refusing to bargain.

The National Board would consider such a refusal on the part of an employer to be an unfair labor practice, because there is nothing in the National Act which permits an employer to refuse to bargain on such a subject. On the contrary, the National Act contains an express recognition of such a union security provision.

See: *Eppinger & Russell Co.* (1944) 56 N. L. R. B. 1259

Tampa Electric Co. (1944) 56 N. L. R. B. 1270

We submit that an employer should not be placed in such a dilemma by the existence of State and National laws which do not coincide. If the employer in this case had taken the other horn of the dilemma and refused to bargain with the Union on a union security provision without a state-conducted election, the employer would in all probability have been found by the National Board to have committed a violation of the National Act. This same question would then be presented to this Court in a different way. The question would then be: Is the existence of the state requirement of a referendum a valid defense for an employer who is charged with a refusal to bargain under the National Act?

In this case the employer chose the alternative which would best preserve harmony in his plant. Rather than become involved in a dispute with the Union, the employer chose the course which led to litigation with the State Board.

In whatever way this question comes before this court, however, the conflict between the State and National Acts is apparent. In the event of conflict the State Act must yield.

In *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942) this court held that the State Act could properly operate in the field of preventing unfair labor practices by *employees*, because the National Act did not attempt to regulate that field. The court added this significant qualification, at p. 751:

> "If the order of the State Board * * * caused a forfeiture of collective bargaining rights, a distinctly different question would arise."

Now we have a case where the State Board's order does cause "a forfeiture of collective bargaining rights," since it requires the employer to cease and desist from observing the maintenance of membership provision of its contract with the union until a referendum has been conducted by the State Board and the requisite number of employees approve it. (R. 9)

In *Hill v. Florida*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782 (1945) this court struck down a state statute requiring unions and business agents to secure licenses or permits before functioning as bargaining agents. This law was held to interfere with the right granted to employees by the National Act to freely choose their bargaining agent.

By the same token in this case, the union's right to bargain collectively with the employer, given to it by the National Act, has been circumscribed by the State Act which requires that the State Board shall first conduct a referendum and two-thirds of the employees must consent, before the parties can bargain collectively on the subject of Union Security.

The Wisconsin Supreme Court in its opinion on the case now here for review states:

> "We refrain from expressing any opinion as to the extent to which it does oust the state board in the field that might be regarded as collective bargaining. In other words the question reserved by the United States Supreme Court in the *Allen Bradley* Case as to the consequences there had the Board's order effected a forfeiture of collective bargaining rights will not be discussed because it is not involved."

If, as here, an employer is subject to the National Act and the National Board under that Act has designated the

bargaining agent and the employer is required before he negotiates under that Act to meet more restrictive provisions of a State Law how can it be denied that the State Act works any the less a forfeiture of collective bargaining rights than was presented in the Florida licensing case? It is submitted that the effect of the more restrictive provisions of the State Act works a forfeiture of collective bargaining rights. The dilemma which the employer faced here very graphically illustrates the point.

In *Hill v. Florida*, 325 U. S. 528, the court points out that the declared purpose of the Wagner Act was to encourage collective bargaining and to assure "full freedom" in the selection of bargaining representatives. This guarantee of "full freedom" was declared necessary for the purpose of "negotiating the terms and conditions of their employment." As this court said: "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.'" There this court said that the state law might prevent an agent from doing that which Congress permitted him to do. The same problem is presented here. The Wisconsin Act sets up a "varied and * * * conflicting" provision and limits the purpose for which the Wagner Act was enacted. Under the Wagner Act those things constituting unfair labor practices were defined and excluded therefrom was the provision of the contract now before this court.

The question of the repugnancy of Section 111.06 of the State Act to Section 8(3) of the National Act was considered in *International Brotherhood of Electrical Workers v. Wisconsin Employment Relations Board*, 245 Wis. 532, 15 N. W. 2d 823 (1944), where the Wisconsin Supreme

Court stated that it was unable to see any conflict of policy between the State and National Acts with respect to union security provisions. It was admitted that the National Act permitted such an agreement when negotiated with a majority representative of employees, whereas the State Act permitted such an agreement only where a referendum had been held and two-thirds of the employees specifically voted in favor thereof. The court says:

> "The policy is the same in both acts. The method by which the bargaining agent is chosen differs but that does not constitute a difference in policy. If in a particular case the National Labor Relations Board takes jurisdiction, of course its determination is superior in legal effect to that of the determination of the State Board, if there is a conflict. In this case the national board having declined to take jurisdiction, there is no conflict in policy or method."

The court treated the question of whether there was a conflict as depending upon whether the National Board had actually taken jurisdiction of the specific complaint then before the State Board. The matter was again considered in *International Brotherhood of Paper Makers v. Wisconsin Employment Relations Board*, 249 Wis. 362, 24 N. W. 2d 672 (1946), where the court compared the National and State Acts in dealing with union security provisions, and said:

> "We are utterly unable to see that there is any conflict between these two provisions."

We submit that where one law permits a union security provision without consent of the employees and the other requires the express consent of 66-2/3% or more of the

employees, there is at least a conflict in policy. It is not infrequent that a majority of the employees desire such a provision but less than 66-2/3% thereof do. The fact that there is a conflict between the two provisions is demonstrated by the present case. It is not denied that tested by the National Act, the union security provision of the contract was valid and enforceable, that the employee discharged pursuant to its provisions was properly discharged and, hence, the employer was not guilty of an unfair labor practice. On the other hand, under the Wisconsin Statute the Wisconsin Court held that the clause, tested by the State Act, was invalid and hence the employer was guilty of an unfair labor practice under the State Law in discharging the employee pursuant to the provisions of a contract negotiated with the duly appointed bargaining agent designated by the National Board.

In the foregoing two cases, the Wisconsin court construes section 8(3) to mean that since the union security provision thereof was included in a proviso, it granted no right but only removed impediments to the making of such an agreement under any federal law or regulation. Whether the Union Security clause was contained in a proviso removing impediments, or whether it was specifically guaranteed, is not of particular importance here. If, as this court held in *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U. S. 767, the identical and non-conflicting provisions of a state act must yield, then certainly a policy conflict, as indicated by a comparison of the union security clauses of the Wisconsin and National Acts, requires that the State Act must yield.

In determining that the proviso contained in section 8(3) conferred no rights but merely removed an impedi-

ment the Wisconsin Court turned to the Senate Reports on the ground that it was well settled that committee reports may be consulted to ascertain the intent of Congress. Whether a court is permitted to turn to legislative committee reports for interpretation depends upon whether or not the meaning of the legislation is doubtful or obscure and the courts will not turn to those reports unless there is some ambiguity in the act itself. The Wisconsin court without expressly finding any doubt or obscurity therein, but citing *Wright v. Vinton Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. ed. 736 (1936), proceeded to considered the Senate Report. This authority upon that subject says:

> "Since the language of the act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure."

We submit that there was no occasion for turning to a committee report in dealing with section 8(3) of the National Labor Relations Act. The policy there enunciated was clear. We further submit that it is sufficient to show a conflict *in policy* in the application of the two acts to the case at hand. This court clearly said in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, that even though there was no conflict between the language of the state and national acts, no conflict of policy would be permitted. Hence, it is clear that the Wisconsin Supreme Court erred in not following the rule of the *Bethlehem Steel Co. case*, and in applying a conflicting state policy to Algoma Plywood & Veneer Company.

In considering the decisions of the U. S. Supreme Court in *Hill v. Florida*, 325 U. S. 528, and *Alabama State Federation of Labor v. MacAdory*, 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725, (1945) the Wisconsin Supreme Court says:

> "Every rule laid down in a decision of the United States supreme court as we understand it is to be limited as applying only to the particular facts on which it is based, and no case of that court is called to our attention that involves a situation like that involved herein." *International Union vs. Wisconsin Employment Relations Board*, 250 Wis. 550, 28 N. W. 2d 254 (1947).

With this approach the Wisconsin Court reviewed this court's decision in the *Bethlehem Steel Co. case*. This gives too restricted meaning to the effect of decisions of the United States Supreme Court upon questions involving the constitution of the United States and the laws of Congress made in pursuanee thereof. The Wisconsin Court confines the effect of the U. S. Supreme Court's decision to precise sets of facts rather than points of law at issue. We submit that the principle adopted in *Chesapeake & Ohio RR. Co. v. Martin*, 283 U. S. 209, 51 S. Ct. 453, 75 L. ed. 983 (1931) and *Provident Institution v. Massachusetts*, 6 Wall (U. S.) 611, 18 L. ed. 907 (1868) extends further than this.

3. The effect of the National Labor Relations Board conducting an election at the Algoma Plant and certifying the Union as the bargaining agent, was to oust the State Board of jurisdiction over the labor relations of the parties.

In *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, this court held that a State Board could not operate in the field of labor relations of the parties where the National Board had asserted its jurisdiction over the industry in which the employer was engaged. At p. 776 appears this language:

> "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

Thus, even though the State Board functioned in a way which was consistent with the policies of the National Board, under a state act consistent with the National Act, this court has held that a State Board may not conduct representation proceedings in an industry engaged in activities affecting interstate commerce.

So here, the National Board took jurisdiction over the labor relations of the company and the union in this case by certifying the Union as bargaining agent (R. 19). In the collective bargaining between the parties which followed that certification, the State Board may not interfere. By attempting to apply the policy of the Wisconsin Act in

this case the Wisconsin court says in effect that an employer may not negotiate a union security agreement, although expressly permitted so to do by the National Act, without complying with the State's more restrictive provisions, and if unable to meet its tests, that it may then not incorporate certain provisions in a collective bargaining contract although under the National Act they would be recognized as valid without complying with such requirements. This is clearly a restriction and an interference with the freedom of collective bargaining under the policy established by the National Act contemplated by the decisions of this court.

The Wisconsin court misapplied the United States Supreme Court's decision in the *Bethlehem Steel Co.* Case. At the outset the Wisconsin Court said that it is "again confronted with a question of delicacy and difficulty concerning 'the delimitation of the power of the state and the federal government over a matter which is subject to some extent to their concurrent jurisdiction.'" (R. 58) This court clearly buried the theory of concurrent jurisdiction in those situations in which both the federal and state statutes have laid hold of the same relationship for regulation and concluded that to recognize the principle would either be productive of useless action or mischievous conflict. Recognition of the states' jurisdiction in *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, was not based upon concurrent jurisdiction but upon a lack of assertion of any jurisdiction on the part of the federal power with respect to unfair labor practices of *employees*. The Wisconsin Court appraised the effect of the *Bethlehem* Case in *International Union v. Wisconsin Employment Relations Board*, 250 Wis. 550, 28 N. W. 2d 254,

stating that the National Board had declined to authorize the formation of a foremen's union when that union applied to the National Labor Relations Board to form a unit. The facts stated in the report of the *Bethlehem* Case do not indicate that the foremen had applied to the National Board. The most that is said on this subject is that the foremen applied to the state board "* * * at a time when their desire to organize was frustrated by the policy of the National Board * * *." Under this misunderstanding the Wisconsin court said that the National Board's declination was an exercise of its jurisdiction just as much as granting the application would have been and that the principles enunciated in the *Bethlehem* Case therefore were restricted to those situations in which the identical dispute or matter had been presented to the federal agency.

Notwithstanding what this court said in the *Bethlehem Steel Co.* Case, the Wisconsin court continues to apply the principle enunciated by it in *International Brotherhood of Electrical Workers v. W. E. R. B.*, 245 Wis. 532, 15 N. W. 2d 823, in which it said:

> "When the National Labor Relations Board has acted in a particular case, the question of whether there is a conflict between the two jurisdictions is to be determined of course by the provisions of these acts * * *. If no proceeding is had under the National Labor Relations Act, no conflict of jurisdiction can arise. This matter was fully discussed in the *Rueping L. Co.* Case already referred to. *The National Labor Relations Board having never taken jurisdiction to certify the name of a bargaining agent, the state board could entertain proceedings relating to violations of state law. In so doing there was under such circumstance no conflict of jurisdiction.* Not every labor dispute arises to

such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce." (Emphasis supplied).

In its opinion in this case it proceeds on the same false premise. The Wisconsin court said in commenting upon its opinion in *International Union v. Wisconsin Employment Relations Board*, supra: (R. 63)

> "We there concluded that the *Bethlehem* Case had simply held that the National Labor Relations Board in the instant Case 'had exercised the jurisdiction delegated to it under the federal act by declining to designate the foremen as a bargaining unit. The declination was an exercise of its jurisdiction, just as much as granting it would have been.' We adhere to this determination. The *Bethlehem* Case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise."

This court in the *Bethlehem* Case did not place its decision on such narrow grounds. Its statement of the facts does not indicate that the foremen had applied to the National Board but implies they had not so applied because the existing policy of the Board frustrated them; they were frustrated not by a denial of an application but by what the court describes as an existing "policy" and the court based its decision not upon the fact that an application had

been made to the National Board and its denial, and not upon any specific conflict between the policies of the two boards, (in fact they were consistent at the time of the hearing in the case) but upon the principle that there was no room for the operation of state authority where both the state and federal statutes regulate the same relationship involving the same employers and the same employees. In other words, as we understand it, this court's decision was based upon the fact that the federal law applied and not that the board operating under that federal law had already acted in that specific case.

The Wisconsin court says that the question involved in this case is whether there was an intervention by the National Board when it conducted an election and designated the bargaining agent which would oust the state of jurisdiction to determine an unfair labor practice under a contract negotiated with a representative following the election. It proceeds to say: (R. 64)

> "Upon consideration we adhere to the view that the mere certificate of a union as a bargaining unit in a particular plant is not such a general assumption of jurisdiction over all of the employment relations of the company as would oust the state board of all jurisdiction. We refrain from expressing any opinion as to the extent to which it does oust the state board in the field that might be regarded as collective bargaining."

This court after eliminating the problem such as was presented in *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740, and confining its discussion to the situations such as that here presented where state and federal legislation has "laid hold of the same relationship for regulation" says "the federal board

has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general," and concludes that therefore it was beyond the power of New York State to apply its policy. The Supreme Court of the State of New Hampshire recognized that conflict in passing upon the unfair labor practice provisions of a similar act in New Hampshire which it was claimed conflicted with the Labor Management Relations Act of 1947. Under the latter law the inclusion of union security provisions now requires the affirmative vote of 51% of the employees and as in Wisconsin the New Hampshire Act required a 66-2/3% vote of approval. In striking down the state law as in conflict with the federal law the New Hampshire court said:

> "A comparison of those provisions with those of the Taft-Hartley Law dealing with unfair labor practices (s. 8), demonstrates that the two acts deal with the same subject matter in much the same way. There are, however, many conflicts between the provisions of the Taft-Hartley Act and the Willey Act * * *. In regard to the union shop under which an employer may hire non-union men of his own selection who, after a probationary period of employment must become union members as a condition of further employment, the Taft-Hartley Act permits such agreements when a majority of employees vote in favor of it, while the Willey Bill requires a two-thirds majority to validate such contracts. Numerous other inconsistencies between the two acts are pointed out in the excellent brief of the petitioners.
>
> "The Constitution of the United States gives Congress jurisdiction over the entire field of interstate commerce, and since Congress has already pre-empted the subject of labor management relations within the

field of interstate commerce, it follows from the paramount character of its authority that state regulation of the subject matter is excluded." *International Union of Teamsters, etc. v. Riley*, 59 A. 2d 476. (1948).

In *International Union v. Wisconsin Employment Relations Board*, 250 Wis. 550, 28 N. W. 2d 254, (1947) the court said that the principle of the *Bethlehem* case did not apply to the problem there at hand because:

> "In the first place, no application has been made to the National Labor Relations Board to exercise any jurisdiction of the *dispute here involved*. The National Labor Relations Board not having exercised any jurisdiction of *such labor dispute* the state board may exercise jurisdiction of it. No conflict is here involved. There was a direct conflict in the *Bethlehem* Case. The National Labor Relations Board had determined that foremen could not form a unit for collective bargaining and the state board said that they could form such a unit." (Emphasis supplied).

In *La Crosse Telephone Co. v. Wisconsin Employment Relations Board*, 251 Wis. 583, 30 N. W. 2d 241 (1947) the Wisconsin court says:

> "But, although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the federal power is exercised or jurisdiction thereto is taken *as to particular employees*." (Emphasis supplied).

The position of the Wisconsin court was made clear in *International Union v. Wisconsin Employment Relations Board*, 250 Wis. 550, 28 N. W. 2d 254, when after discussing in detail the effect of the *Bethlehem* Case the court says:

> "But however that may be, if the Wisconsin Employment Relations Board is to be in effect abolished by the judgment of a court that judgment will have to be rendered by the supreme court of the United States."

The jurisdiction of the State was ousted when the National Labor Relations Board took jurisdiction of the labor relations of Algoma Plywood & Veneer Company in general, by conducting an election pursuant to petition therefor and certifying the bargaining agent with whom the employer has since negotiated its labor contracts. This principle was firmly established by this court in the *Bethlehem Steel Company* Case. Because of the nature of the activities of the employer, the National Labor Relations Board, in addition to asserting its jurisdiction, had jurisdiction of the industry in which these particular employees are engaged. Therefore, even in the absence of a specific assertion, the jurisdiction of the state board was ousted and its attempt to apply its policy was improper.

Hence, because (1) the National Act conferred on the National Board exclusive authority to deal with employer unfair labor practices under the Act, (2) the Wisconsin Employment Peace Act was repugnant to the National Labor Relations Act with respect to what constitutes an unfair labor practice by an employer, and (3) the jurisdiction of the State of Wisconsin was ousted by an assertion of jurisdiction by the National Labor Relations Board which had jurisdiction over the labor relations of the parties, the assertion by the State of Wisconsin of jurisdiction and the application of its conflicting policy to the employer and its

employees was in excess of its authority. For these reasons the decisions of the courts below should be reversed.

Respectfully submitted,

MALCOLM K. WHYTE,
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VICTOR M. HARDING,
Counsel for Petitioner.

In the

Supreme Court of the United States

October Term, 1948

No. 216

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

On Certiorari to the Supreme Court
of the State of Wisconsin

REPLY BRIEF OF ALGOMA PLYWOOD AND VENEER CO., Petitioner

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FACTS

The brief of the Wisconsin Employment Relations Board in its preliminary statements emphasizes the continuing nature of the order of the Wisconsin Employment Relations

Board. This was but a portion of the Board's order. A very substantial part of the order included a directive to take affirmative action involving immediate and full reinstatement of the discharged employee and making whole such discharged employee for any loss of pay suffered by reason of the alleged discrimination. (R. 9, 10.)

ARGUMENT

A. The test of the jurisdiction of the Wisconsin Employment Relations Board and the validity of the Board's order in this case is whether or not there was a conflict with the National Labor Relations Act prior to its amendment in 1947.

Respondent rests its case principally on the ground that the Labor Management Relations Act of 1947 recognizes the jurisdiction of the State Board. The fallacy in such argument is that the order involved here was entered by the Wisconsin Employment Relations Board prior to the adoption of the Labor Management Relations Act of 1947. The jurisdiction of the State Board rests not upon that law but the National Labor Relations Act prior to its amendment in 1947.

The respondent argues, "If the issues are so limited we assume they are moot, because that Act is no longer in existence; * * *."

The assumption is unwarranted. The order of the Wisconsin Employment Relations Board which is the order here under review, directed petitioner to reinstate the discharged employee and make him whole for any loss of pay he might have suffered since the date he was discharged for failure to maintain his membership in Carpenters and Joiners of America, Local Union No. 1521. The issue of the validity of the State Board's order must certainly be tested by its

jurisdiction at the time it was entered and cannot be affected, except perhaps in respect to a *futuro* remedy, by any subsequent amendment of a statute which rendered the enabling act void. The sole question presented upon this review is whether the Wisconsin Employment Relations Board on April 30, 1947 had jurisdiction to enter the order it did against the petitioner. Counsel for the respondent attempts to change that issue to one of whether the respondent might have entered such an order several months later, after the enactment of the Labor Management Relations Act of 1947.

Respondent suggests that petitioner has argued a case which is moot. It is submitted that the case in no way became moot by subsequent amendment of the conflicting statute and in fact respondent argues an academic proposition as if the events in the record had taken place some months thereafter.

The question argued by respondent, we understand, is now on petition to this court for a writ of certiorari in the case of *International Union v. Riley* (1948) .... N. H. .... 59 A. (2d) 476. But the circumstances of that case are entirely different for the reason that the events there took place after the enactment and applicability of the Labor Management Relations Act of 1947.

It is significant that respondent in its brief does not rely upon the position of the Wisconsin Supreme Court in sustaining the jurisdiction of the state board in this case, but substantially on a new theory not heretofore suggested.

As has been pointed out the respondent argues this case as though it involved solely a continuing order in the nature of an injunction, but we have shown by references to the record that much more than merely that point is involved. The rights of parties to a contract under then existing law is the basic substantive problem here and this court has held

that in that situation, at least, subsequent repeal of a statute has no effect upon pending litigation involving circumstances arising under the previous statute.

Pacific M. S. S. Co. v. Joliffe, 2 Wall 450, 17 L. ed. 805 (1865).

Ellor v. City of Tacoma, 228 U. S. 148 (1913).

Accordingly the question here must be resolved by a determination of whether or not there was such conflict between the state act and the National Labor Relations Act, prior to the amendments of 1947, as would supersede the state act and therefore deny the jurisdiction of the state board.

Some effort was made by respondent to suggest that the Circuit Court review of the state board's order was what gave the board's order legal effect and that this decision was made after the Labor Management Relations Act of 1947 was enacted. But the whole scheme of Chapter 111 of the Wisconsin Statutes vests powers to enter final orders in the state board therein designated. The statute provides at Section 111.07(4):

> "* * * Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper."

It is true that the statute makes provision for enforcement of the order by the courts but by virtue of the specific delegation of such powers as indicated to the board itself, it can hardly be doubted that they had legal effect when entered by the board on April 30, 1947.

That Congress did not intend the 1947 amendments to apply to existing contracts under the original act was demonstrated by Section 102 of the Labor Management Relations Act of 1947 which provides:

> "Section 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of Section 8(a)(3) . . . of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective bargaining agreement entered into prior to the date of enactment of this Act . . . if the performance of such obligation would not have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to the effective date of this title . . ."

B. The reservation of state jurisdiction cannot arise by implication unless there is some necessary inference of intention by Congress to save state laws.

The exclusive character of the jurisdiction of the federal government in this case is founded upon the United States Constitution. Article I, Section 8 confers upon Congress the power "To regulate commerce with foreign nations, and among the several states." Article VI, Clause 2 makes that power supreme, providing:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

1. The entry into the field by the National Government excludes the states, unless saved specifically or by necessary implication.

When Congress enters a particular field committed to it by the constitution, state action is automatically superseded unless it is saved by some specific provision therefor or by necessary inference.

Napier v. Atlantic Coastline R. R. Co., 272 U. S. 605 (1926).

Northern Pacific R. R. Co. v. State of Washington, 222 U. S. 370 (1912).

Second Employer's Liability Case, 223 U. S. 1 (1912).

Erie R. R. Co. v. New York, 233 U. S. 671 (1914).

Pennsylvania R. R. Co. v. Public Service Comm. of Pa., 250 U. S. 566 (1919).

Oregon-Washington R. R. and Navigation Co. v. State of Washington, 270 U. S. 566 (1919).

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942).

First Iowa Hydro-Electric Co-operative v. Federal Power Commission, 328 U. S. 152 (1946).

II. The doctrine of concurrent jurisdiction is inapplicable.

The Wisconsin court and respondent have misunderstood the meaning of concurrent jurisdiction. Chief Justice Marshall in a very early case denied the existence of it in the sense in which it is applied by the Wisconsin Court by saying that if National and State Acts come into collision on interstate commerce, whether the state law was passed by virtue of concurrent power to regulate commerce among the several states or in virtue of power to regulate domestic trade and policy, the state act must yield if it deprives a citizen of the right to which the national act entitles him.

Gibbons v. Ogden, 9 Wheat. 1 (1824).

The doctrine of concurrent jurisdiction permits state action in a field which the federal government might occupy only until the latter actually enters the field.

Southern R. R. Co. v. Reid, 222 U. S. 424 (1912).

The state court here maintained, as New York State did in the Bethlehem Steel Co. Case, that the national act has no effect except when the National Board has instituted proceedings; but it is the Act, not the Board which creates the obligations which employers are required to accept. The Act would be ineffective if it applied only when the Board has entered an order in a specific case. And the Court clearly refused to recognize that principle in the Bethlehem Case.

III. A state law may not supplement a National Act regulating commerce.

A state may no more supplement the requirements of a national act than it can annul them in the absence of some specific saving clause or necessary inference that the state should have such power, when Congress has exercised its exclusive power over interstate commerce.

Erie R. R. Co. v. New York, 233 U. S. 671 (1914). (State may not limit hours of work of railroad employees to less than that allowed by federal law.)

Pennsylvania R. R. Co. v. Public Service Commission of Pa., 250 U. S. 566 (1919). (State may not require additional platforms on railroad cars in interstate commerce beyond those required by the regulations of ICC.)

Napier v. Atlantic Coastline R. R. Co., 272 U. S. 605 (1926). (State may not require further safety devices on interstate railroad engines such as fire box doors and cab curtains when ICC does not require it.)

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942). (States more restrictive qualifications for butter being prepared for interstate commerce may not be enforced against federal regulation which treats that butter as wholesome.)

IV. Congress here intended to exclude the states.

(a) No specific savings clause was incorporated in the act.

There is no specific savings clause for state legislation here. Had Congress intended that state laws for the prevention of unfair labor practice be preserved it presumably would have used the time honored, tested and approved method of saying so with a simple saving clause. Failure to do so indicates an intent that state laws be superseded thereby.

First Iowa Hydro-Electric Co-operative v. Federal Power Commission, 328 U. S. 152 (1946).

In the following acts such saving clauses were used, for instance:

Fair Labor Standards Act of 1938.

Securities Exchange Act of 1934.

(b) Section 10(a) indicates Congressional intent that jurisdiction over unfair labor practices was exclusively assumed.

Section 10(a) specifically says that the power to prevent unfair labor practices is exclusively vested in the National Board. No qualification was made in that term as it was, however, in some other sections of the Act. Hence, the only possible inference is that it meant exclusion of all other possible interference.

Respondent reads section 10(a) as excluding only other federal agencies. The history of the act demonstrates that

the main purpose was to meet the unsatisfactory condition created by a wide variety of independent boards and create a single paramount quasi-judicial authority. No state boards then existed. It seems unlikely that in its zeal to exclude jurisdiction of other agencies (there were then about 12 to 15 federal agencies) it meant to single out just the federal agencies and open the door to much greater variety and conflict by permitting 48 states to establish additional independent agencies. In fact, the Congressional Report points out that a *uniform national policy* was intended and that it should receive uniform interpretation everywhere.

S. Rep. 573, 74th Cong., 1st Sess., pp. 4-5.

> "While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be worked out by the courts, *it seeks the full limit of that power in preventing these unfair labor practices.*" (Senator Walsh in Report of Committee on Education and Labor.)

The National Labor Relations Act is a national act intended to solve national problems. A state board with no power to investigate national labor problems will likely follow local points of view. Uniform application to a company operating in many states will stabilize its labor relations, while variations due to different state rules tend to have disruptive effects on its labor relations. This is of interest to the National Board but of no interest to a states board. Thus a conflict in aims and results arises because of variant purposes.

National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111 (1944).

This court said in *Polish National Alliance v. National Labor Relations Board*, 322 U. S. 643 referring to the National Labor Relations Act

> "By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."

The question of protection under the National Labor Relations Act must not be dependent upon the accident of the location of an employee within one state or another. The history of the National Labor Relations Act demonstrates that Congress did not intend a patchwork plan for securing freedom of employees' organizations in their collective bargaining. The application of the Federal Act was not intended to depend on state law. The act was not to be administered in accordance with different standards the respective states might see fit to adopt.

> *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 (1944).

Respondent has urged that section 10(a) relates to procedural matters only. The language of the section, however, is "jurisdiction," and hence clearly excludes intervention by state agencies. The decision in *Allen Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U. S. 740 (1942) was based upon the fact that the unfair practice there claimed involved a field not regulated by Congress; it was in fact not one of those practices listed in section 8."

C. The Wisconsin Court and Respondent urge reliance upon legislative reports as aids in interpretation of an act they contend is clear.

It is well accepted that unless there is such ambiguity as will not admit of reasonable interpretation the courts may not resort to legislative history for the purpose of construing a statute. Respondent in substance admits that there is no ambiguity except such as is raised by petitioner's claimed construction. Thus each party agrees that the mean-

ing of the act is clear; hence, there should be no need to resort to legislative history.

When one looks at the legislative history of the act, ambiguity certainly is introduced. We think it is a new and unwarranted principle to ask a court to refer to conflicting statements in legislative history for the purpose of interpreting a clear statute.

We think that there is some doubt that reference to legislative history is ever justified or helpful. The English courts have consistently refused to consider legislative history whether the statute was ambiguous or not, agreeing with Mr. Justice Holmes, who said, "We do not inquire what the legislature meant, we ask only what the statute means."

Barbat v. Allen, 7 Exch. 609 (1852).

Attorney General v. Sillem, 2 Hurlst N. C. 431 (1863).

Re York, 2 Q. B. 1 (1841).

Ewart v. Williams, 3 Drew. 21 (1854).

Arding v. Bonner, 2 Jur. N. S. (1856).

Construing a statute relating to religious education in public schools, Collins, M. R. in *Rex v. West Riding of Yorkshire County* (1906), 2 K. B. 676, p. 700, said:

> "Both sides sought to refer to what passed in Parliament as supporting their respective contentions as to the meaning of the enactment, but such evidence was, of course, inadmissible, and we have confined ourselves, as we were bound to do, to an attempt to collect the meaning from the language used."

In *Viscountess Rhondda's Claim* (1922) 2 A.C. 339 (House of Lords), in passing upon the claim of the viscountess to sit in the House of Lords, Lord Wrenbury said:

> "The Attorney General tendered as evidence to be considered by the Committee an entry in the Journals of your Lordship's House of November 11, 1919, p. 432. The Attorney General did not and could not dispute that it is well settled that in construing a statute regard must be had to the language of the statute, and to that alone, assisted by a knowledge of the state of law at the day it was passed and the intent to be gathered from the statute itself if an alteration in the law. But he sought to say then an entry in the Journals did not fall within that principle. The debate upon the Bill, the fate of amendments proposed and dealt with in committee in either house, cannot be referred to to assist in construing the language of the Act as ultimately passed into law with the Royal assent."

and Viscount Birkenhead, L. C., said:

> "The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act."

In *Reg. v. Hertford College*, L. R. 2 Q. B. Div. 693 (1878) in construing an act of parliament, the court held that the statute was clear and that the "parliamentary history of the statute is wisely inadmissible to explain it if it is not."

At least unless there is serious doubt as to the meaning of the statute resort may not be had to constitutional or legislative debates, committee reports, journals, etc., for the purpose of interpreting it.

Anno. 70 ALR 5.

A statute should not mean what was not put into words by the legislators but only that which was actually incorporated therein. Legislation results from much deliberation and the resolution of conflicting views and should not be

interpreted to reflect extreme views in either direction but only that which is specifically said by the act itself. It has been pointed out that legislative debate is unreliable because it usually reflects tentative rather than final views, and that often misinterpretations are left unresolved lest more definite statements imperil the chance of passage. Legislative history involves many questions of policy which courts in the interpretation of statutes should ignore.

But here as in many other similar situations the greatest ambiguity surrounding the whole subject is raised by the legislative history itself. Respondent cites on page 7 of its brief an excerpt from the Conference Report of the Labor Management Relations Act of 1947 which says: "Under the house bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop * * *." Evidently the Congress concluded that it was necessary to provide some assurance which did not exist theretofore and hence added a specific provision for that purpose. It must, therefore, be inferred that there was no assurance of such exclusion of authorization in the previous act.

The house conference report in commenting upon section 10 of the Act says:

> "As under the present Act, the power of the Board under the Amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the states a concurrent jurisdiction in respect to closed shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide uniformity in matters of national policy under the commerce clause."

Respondent relies upon the decision in *Giant Foods Shopping Center, Inc.* (1948) 77 NLRB No. 153, 22 LRRM

1070 in which the board passes upon section 14(b) of the Labor Management Relation Act of 1947. Here again, however, we are dealing with a subject which is not applicable to the present case.

In the 1947 amendments to Section 10(a) the word "exclusive" in defining the National Board's jurisdiction over unfair labor practices was dropped. There was added a new provision empowering the Board to cede jurisdiction to a state agency but only where the provisions of the state statute applicable to the determination of such cases by such agency is consistent with the National Act. The committee reports hail this as some new and added concession to state jurisdiction. If this be true, it more eloquently denies the prior right of any state to so assert its policy than any other argument.

Respondent, though urging that the Labor Management Relations Act of 1947 applies, does not assert the necessary qualification that the National Board ever ceded its jurisdiction in this case or any other, or in any general way. Its only reference to that point is to show that the National Board is conducting all elections on the closed shop which would indicate the contrary. Under the conflicting provisions of the Amended Act and the state act, it is inconceivable that the National Board would cede jurisdiction for it is not authorized so to do where there is such conflict.

The provisions of Section 14(b) of the amended act do not aid respondent's position even if that act were applicable. No provision of the state act *prohibits* the kind of contract referred to in that section. Indeed, the state act permits such contracts (including the now nationally condemned "closed shop") when a different percentage of employees vote in favor of it.

Both in the conference report and the Senate Report on

the proviso of Section 8(3) of the National Labor Relations Act as amended in 1947 it is pointed out that the act "permits" maintenance of membership.

> Conference Report, House Report 510, 80th Cong. p. 41. Senate Report 105, 80th Cong., pp. 6-7.

As the Senate Report points out, "although these regulatory measures have not received authoritative interpretation by the Supreme Court, * * * it is obvious that they pose important questions of accommodating Federal and State legislation affecting commerce (*Hill v. Florida*, 325 U. S. 538; see also *Bethlehem Steel Co. v. N. Y. Labor Board* decided by the Supreme Court April 7, 1947)."

The Senate Report under the original act said "Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with Section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matter."

> Senate Report No. 573, 74th Cong., p. 15.

Since the adoption of the 1947 amendments conferring power on the National Board to cede jurisdiction to state agencies under Section 10(a) dealing with unfair labor practices the Board's General Counsel went into the question. He reported in a speech on March 10, 1948 that,

> "We have explored the possibilities of such agreements with several of the state boards, but thus far we have not concluded any agreements because there are too many instances where the state statute and the Federal statute are inconsistent.
>
> "The answer is, therefore, that it appears to us that we are obliged to proceed in all situations where court decisions indicate that the Federal power exists, unless and until the state statute is made to conform to the Federal satute or the latter is amended. . . ."

Petitioner therefore submits that the congressional reports inject more ambiguity than is apparent in the act itself, that they are conflicting and support petitioner's claimed interpretation as much as any other or more, and that the reports under the amended act make clear that the State Board here had no jurisdiction to enter its order, even under the amended act.

Respondent's suggestion that the reports under the amended act be used to ascertain what the 74th Congress meant when it adopted the original act seems particularly unwarranted. The personnel was different and it seems that this extra judicial function assumed by the report should not under any circumstances be considered.

CONCLUSION

The validity of the order of the State Board and its jurisdiction in this case must be tested by the provisions of the National Labor Relations Act prior to its amendment in 1947. The state act was clearly invalid as in conflict with that law and hence the State Board was without jurisdiction in this case. The same result follows even though its validity were to be tested under the National Act as amended by the Labor Management Relations Act of 1947.

Respectfully submitted,

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APPENDIX

Wisconsin Statutes

Section 111.02. Definitions. When used in this subchapter: * * *

(9) The term "all-union agreement" shall mean an agreement between any employer and the representative of his employes in a collective bargaining unit whereby all or any of the employes in such unit are required to be members of a single labor organization.

Section 111.06 *What are unfair labor practices.*

(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *

U. S. Statutes

Original National Labor Relations Act

Sec. 8.

It shall be an unfair labor practice for an employer—

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, sec. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

National Labor Relations Act as amended by Labor Management Relations Act of 1947.

Sec. 8(a).

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: Provided

Sec. 10(a)

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sec. 10(a).

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to

the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Sec. 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Sec. 14.

Wherever the application of the provisions of section 7(a) of the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, sec. 707(a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922; pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

In the

Supreme Court of the United States

October Term, 1947

No. 216

ALGOMA PLYWOOD AND VENEER CO.,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

STATEMENT OF WISCONSIN EMPLOYMENT RELATIONS BOARD WAIVING OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE GILMAN PRESS, MADISON, WIS.

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The issues raised by the petitioner in this case are similar to those in two other proceedings to review action of the Wisconsin Employment Relations Board, which have been placed on the docket of the United States Supreme Court for argument on the October Term, 1947. Those cases are:

International Union, U. A. W., A. F. of L., Local 232, et al — No. 14

v.

Wisconsin Employment Relations Board, et al

and

Wisconsin Employment Relations Board, et al

v. No. 15

International Union, U. A. W., A. F. of L., Local 232, et al

La Crosse Telephone Corporation

v. No. 38

Wisconsin Employment Relations Board, et al

and

International Brotherhood of Electrical Workers, Local B-953, A. F. of L.

v. No. 39

Wisconsin Employment Relations Board, et al

The issues in the foregoing cases as well as in the instant case involve the extent to which Congress intended by the enactment of the National Labor Relations Act and its successor, the Labor Management Relations Act, to preclude state regulation of labor relations.

The state board is desirous of precedent for its future guidance. The instant case presents another phase of the issues before this court in the two cases previously accepted. It is the belief of the Wisconsin Employment Relations Board that the proper administration of law, not only by the State of Wisconsin but by all other states, will be best served by the submission of the issues as fully and completely as can be done. The grant of certiorari in the instant case would place before the Supreme Court of the United States for consideration a more nearly full complement of

the types of situation in which the issues arise. We believe the consideration by this court of the instant case with the cases previously accepted will facilitate the deliberations of the court as well as make possible the establishment of a precedent to coordinate more effectively the respective functions of federal and state agencies.

Wherefore the respondent, Wisconsin Employment Relations Board above named, waives its right to file a brief in opposition to consideration of the petition for writ of certiorari and prays that the decision of the Wisconsin Supreme Court in the case numbered 189 on its August Term, 1947 entitled *Wisconsin Employment Relations Board, plaintiff, v. Algoma Plywood and Veneer Company, Defendant*, may be reviewed and affirmed by the Supreme Court of the United States.

Respectfully submitted,

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Brief of Wisconsin Employment Relations Board

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In the

Supreme Court of the United States

October Term, 1948

No. 216

ALGOMA PLYWOOD AND VENEER CO.,

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WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Brief of Wisconsin Employment Relations Board

The opinion of the Wisconsin Supreme Court of which review is sought is reported in 252 Wis. 549, 32 N. W. 2d. 417. The Wisconsin Supreme Court affirmed a judgment of the Circuit Court for Kewaunee County which is unofficially reported in 14 Labor Cases (C. C. H.) par. 64,253, sustaining and enforcing an order of the Wisconsin Employment Relations Board requiring the petitioner to cease and desist from encouraging membership in a specified labor organization by requiring as a condition of employment that employees become and remain members of such organization (R. 8-9).

STATEMENT RESPECTING GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner seeks to invoke the jurisdiction of this court under sec. 237 (b) of the Judicial Code, 28 U. S. C. A. sec. 344 (b), on the ground that the validity of the order of the state board is drawn in question in that it is repugnant to sec. 8 (3), 49 Stat. 452, 29 U. S. C. A. §158 (3), and sec. 10 (a); 49 Stat. 453, 29 U. S. C. A. §160 (a) of the National Labor Relations Act (Wagner Act).

The order of the state board was entered prior to the effective date of the Labor-Management Relations Act, 1947, but the judgment of enforcement, by which it was given legal effect, was not entered until after that act became law. Since the order of the state board is continuing, we assume that the question of conflict with federal legislation is still present and is now based upon the provisions of the Labor-Management Relations Act, 1947, 61 Stat. 136-161, 29 U. S. C. A. Supp. secs. 141-197.

The petitioner argues the question only with relation to the National Labor Relations Act. If the issues are so limited we assume they are moot, because that act is no longer in existence; but since we believe the state's action to be valid under either law, we will cover both in our argument.

QUESTION PRESENTED

Is a state prevented by the National Labor Relations Act, or its successor, the Labor-Management Relations Act, 1947, from further restricting agreements requiring membership in a labor union as a condition of employment, when such agreements are made and performed in such state?

FACTS

The Algoma Plywood and Veneer Company (hereinafter referred to as the company or the employer) is a manufacturing concern operating within the state of Wisconsin and employing approximately 650 production workers (R. 38). In 1942, the Carpenters and Joiners of America, Local #1521 (hereinafter referred to as Local 1521) was designated by a majority of the company's employees in an election conducted by the National Labor Relations Board as their bargaining representative (R. 19). Since that time, the company and Local 1521 have entered into annual contracts covering wages, hours and working conditions (R. 19). A contract was executed between the company and Local 1521 in April 1946, to be effective for a term of one year, containing the following provision:

> "* * * All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing" (R. 39).

In January of 1947, the company discharged Victor Moreau pursuant to the foregoing provision, for failure to pay his dues in Local 1521 (R. 25, 29, 31).

Moreau filed an unfair practice charge against the employer before the Wisconsin Employment Relations Board (hereinafter referred to as the state board) (R. 12). After due hearing, the board found that the employer had encouraged membership in Local 1521, by discrimination in regard to tenure of employment, and directed the employer to cease and desist, unless the contract provision above quoted should be approved in a referendum conducted among the employees in accordance with the Wisconsin Statutes.

The bargaining unit covered by the contract in question includes production employees (R. 19), all of whom work wholly within the boundaries of Wisconsin. The testimony indicates that 95% of the company's business "deals in" interstate commerce, which presumably refers to the source of supplies and ultimate destination of products (R. 24).

SUMMARY OF ARGUMENT

I.

A. Congress has shown its intent, both expressly and by implication, to leave authority in states to further restrict contracts requiring union membership as a condition of employment. Such intent is shown expressly in the Labor-Management Relations Act, 1947, and impliedly in the National Labor Relations Act.

The National Labor Relations Board recognizes in its administration of federal regulation, that Congress preserved to states the question of what, if any, further restrictions are to be imposed with respect to contracts requiring union membership as a condition of employment.

B. Both the spirit and the wording of sec. 8 (3) of the National Labor Relations Act show that its purpose was not to authorize or to encourage contracts requiring membership in a labor organization as a condition of employment.

C. Sec. 10 (a) relates to procedure only, and was not intended to foreclose state action as to subject matter except where such action would stand as an obstacle to Congressional objectives.

General provisions affecting power and jurisdiction under federal legislation must be read so as to give effect to the specific provision preserving powers of states with respect to restriction of contracts requiring union membership as a condition of employment.

II.

The conduct of an election by the National Labor Relations Board to determine the employees' choice of a bargaining representative was not intended to confer power to enter a contract providing for compulsory unionism.

The authority of the bargaining representative emanates from the employees who are its principals, and not from a government agency. Its contracting powers are no greater than those of its principals.

The subject matter of contracts between employers and representatives of their employees are subject to the

usual rules of contract. The legality of such subject matter is determined by the law of the forum where the contract is made and performed.

ARGUMENT

I.

CONGRESS HAS LEFT TO STATES THE AUTHORITY TO IMPOSE FURTHER RESTRICTIONS UPON CONTRACTS PROVIDING FOR COMPULSORY UNIONISM

A. Congress has shown its intent affirmatively in sec. 14 (b) of the Labor-Management Relations Act, 1947

Sec. 14 (b) of Title I of the Labor-Management Relations Act, 1947, 61 Stat. 151, 29 U. S. C. A. Supp. §164 (b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

By the foregoing section, Congress intended to define the law as it had existed *previously* under the National Labor Relations Act and to incorporate it in the Labor-Management Relations Act, 1947. As pointed out in the confer-

ence report which was before Congress when the Labor-Management Relations Act, 1947, was adopted:*

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that *nothing in the act was to be construed as authorizing any* closed shop, union shop, maintenance of membership, or other *form of compulsory unionism* agreement in any State *where the execution of such agreement would be contrary to State law.* Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was *never the intention of the National Labor Relations Act*, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (3) of the existing act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were *contrary to the State policy.* To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect." (Emphasis supplied) (Leg. Hist. of the Labor-Manage-

*It has been suggested by the petitioner that there is no occasion for reference to committee reports to ascertain the intent of Congress because there is no obscurity in the language. It was our contention, too, that the language of the provisions invoked by the petitioner were unambiguous in showing that Congress left a field for state action; but if the contentions of the petitioner that it did not do so carry any weight, they create an ambiguity which warrant resort to committee reports. **Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.**, 300 U. S. 440, 81 L. ed. 786, 57 S. Ct. 556, 112 A. L. R. 1455; **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172, 16 A. L. R. 196; **McLean v. U. S.**, 191 U. S. 88, 48 L. ed. 888, 33 S. Ct. 122; **Northern P. R. Co. v. Washington**, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 S. Ct. 160; **Occanic Steam Nav. Co. v. Stranahan**, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 S. Ct. 671; **Smith v. Payne**, 194 U. S. 104, 48 L. ed. 893, 24 S. Ct. 595.

ment Relations Act, 1947, Vol. 1, p. 564, published by N. L. R. B., U. S. Gov't. Printing Office, 1948; 80th Cong. House Conference Rept. No. 510 on H. R. 3020, p. 60.)

The National Labor Relations Board has recognized that Congress intended to remove "all federal restrictions upon existing and future state legislation prohibiting compulsory unionism insofar as the National Labor Relations Board is concerned, even where such legislation may affect employees engaged in interstate commerce." See *Giant Food Shopping Center, Inc.*, (1948) 77 NLRB #153, 22 LRRM 1070 in which the National Board said:

> "The issue before us on appeal, therefore, is the effect of Section 14 (b) upon the substantive union-shop provisions of the Act, that is, Sections 9 (e) (1) and (8) (a) (3). More specifically we are called upon to determine whether by reason of Section 14 (b) a unit is inappropriate for purposes of a union-shop election under Section 9 (e) (1) where such unit includes employees whose work is performed in a State which forbids union-shop agreements of the type sanctioned by Section 8 (a) (3).
>
> "The language of Section 14 (b) is amply clear, free from ambiguity, and emphatically proscriptive. Appearing as it does under that part of the Act entitled 'Limitations,' we believe that Section 14 (b) must be viewed as placing a limitation on all provisions of the Act, including Section 8 (a) (3) and 9 (e) (1), which in their unrestricted application might be construed as superseding or invalidating any State or Territorial law which prohibits membership in a labor organization as a condition of employment. Section 14 (b),

therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce. The power of the several States in certain circumstances to regulate the terms and conditions of employment is well recognized. (Bethlehem Steel Co., et al v. New York State Labor Relations Board, 330 U. S. 767, 772 [19 LRRM 2499].)

"The intent of Congress, consistent with this construction, is set forth with clarity in the legislative history preceding the enactment of Section 14 (b). Thus, the House Conference Report (H. Rep. No. 510, 80th Cong., 1st. Sess., p. 60) on the bill which became law states in part:

"'Under the House bill [H. R. 3020] there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. * * * The conference agreement, in Section 14 (b), contains a provision having the same effect.

"The purpose of Section 13 of the House bill, adverted to above, was stated in the House Report accompanying H. R. 3020 as establishing the policy that *'the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the State laws limit compulsory unionism more drastically than does the Federal law.'* (H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 34.) Thus, the legislative history preceding the enactment of Sec-

tion 14 (b) fully supports the otherwise clear language of this provision as establishing the intent of Congress to leave to the exclusive jurisdiction of the States the prohibition of union-shop agreements *to the extent that prohibition in this respect now exists or may hereafter exist in such States.* (That Section 14 (b) is applicable to future as well as existing State legislation is beyond the peradventure of a doubt. See H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 34, 93 Cong. Rec. 6456, 6520.)

"* * *

"We are convinced, therefore, that the conduct of union-shop elections pursuant to Section 9 (e) (1) in States which prohibit union-shop agreements would serve no useful purpose. To the contrary, it would lead only to the circumvention and frustration of State law, a result that Congress clearly did not intend as evidenced by its enactment of Section 14 (b). We conclude, therefore, that Section 14 (b) prohibits the utilization of Section 9 (e) (1) and the consequent application of the proviso of Section 8 (a) (3) by employers and unions who seek to evade the obligations imposed by State law prohibiting the execution or application of union-shop agreements." (Emphasis supplied)

The general counsel for the National Labor Relations Board has recognized that where state laws do not prohibit entirely union shop agreements but condition them more strictly than does the federal law, the stricter state law must be applied to contracts made and performed in such stat. See 12 LRR 262, and CCH-LLR par. 4530.12, p. 4753.4 which summarizes practice of the National Board as follows:

> "In a state the law of which makes the validity of a union security agreement dependent upon approval by a majority greater than that required under the amended NLRA, the Board will not certify a union shop authorization unless the greater majority required under state laws has been obtained."

Wisconsin is the first state with which the National Labor Relations Board has entered into an agreement pursuant to the Labor-Management Relations Act, 1947. The agreement provides that the National Board will conduct elections on the union shop to obviate the necessity of two elections. 22 LRR 268.

The foregoing actions by the national board demonstrate its administrative understanding that requirements such as contained in the Wisconsin Statutes (prohibiting union shop agreements unless they are validated by employee referendum in which two-thirds of the employees favor the agreement, as distinguished from the National Act which requires only a majority vote) are valid and do not conflict with federal legislation.

We do not suggest that the national board could change the purport of a Congressional enactment. Where, however, the administrative body charged with the enforcement of a federal law adopts a practical construction which is not in conflict with the provisions of the law, that construction will be given great weight and will not be rejected by the courts except upon extremely cogent considerations.*

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*Innumerable cases have been cited to that effect by this court, but we will cite only two where the interpretation of laws by federal agencies was applied so as to permit states to regulate in fields where it was asserted that Congress had precluded such regulation. See, for instance, **Mintz v. Baldwin,** (1932) 289 U. S. 346, 351, 53 S. Ct. 611, 77 L. ed. 1245, in which it was held that the state was not precluded by federal legislation on the subject from preventing the import of cattle without certification that they were free of disease. In arriving at the

We believe the interpretation of law followed by the National Labor Relations Board and followed by the Wisconsin Supreme Court in the case now under examination correctly represents the Congressional intent; but a different result was reached in New Hampshire in *International Union of Teamsters v. Riley,* (1948) N. H. , 59 A. 2d 476. It was there held that although Congress left to states the power to *prohibit* compulsory unionism, it did not leave to states the power to regulate it in any other manner; and that accordingly state legislation which prohibits such contracts only under certain circumstances is invalid. The view taken by the National Labor Relations Board and the Wisconsin Supreme Court seems to us to be the better one for several reasons:

1. The state order under review falls within the literal scope of sec. 14 (b) of Title I of the Labor-Management Relations Act, 1947. It *prohibits* the execution and application of a contract provision requiring membership in a labor organization. The fact that such a contract might not be prohibited under other circumstances does not remove the prohibition of the state board which is under review from the literal application of sec. 14 (b).

---

decision that Congress did not intend to preclude such regulation by states, this court said:

"* * * Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease. * * *"

See, also, **First Natl. Bank of Missouri,** (1923) 263 U. S. 640, 658, 44 S. Ct. 213, 68 L. ed. 486 holding that a state statute prohibiting branch banks was valid in application to a national bank, since it did not frustrate any purpose of the federal legislation. In reaching that result, this court took note of the fact that such interpretation of the federal legislation accorded with administrative interpretation by the Department of Justice and said:

"This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove doubt as to its meaning if any existed. * * *"

2. If sec. 14 (b) be deemed as nothing more than a Congressional authorization for states to *prohibit* compulsory unionism, that would still authorize state action *short* of complete prohibition. As stated in *Cantini v. Tillman*, (1893) 54 Fed. 969, 974, 975:

> "* * * Now, every greater includes the less. If the manufacture and sale can be entirely prohibited, they can be prohibited unless certain rules are complied with.
>
> "* * *
>
> "* * * Regulating a thing is the prohibition of it, except in accordance with certain rules * * *."

3. The view that sec. 14 (b) is a *delegation* of authority to states, and that it was intended to express a precise delimitation of state power, disregards the fact that it was included in the law merely as a verification of Congressional policy—to show that Congress had never intended to go any further into the traditional area of state regulation respecting legality of contracts than to impose a partial prohibition, and to leave it to individual state policy whether further limitations should be imposed.

If sec. 14 (b) be regarded, as it was intended to be, as a pronouncement of the limited extent to which Congress intended to occupy the field, the sole question is whether the particular state action involved is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Of course a state could not legislate to authorize a contract prohibited by federal law.* Neither could a state prohibit something required by federal law. However nothing in the federal law requires the execution or application of a contract providing for com-

pulsory unionism under any circumstances, but rather it regulates in the opposite direction by restricting interference with free choice of employees under contracts which would be lawful, but for such legislation. Both the federal and state legislation with respect to compulsory unionism are restrictive, the only difference being that the state's is somewhat more restrictive. Two pieces of legislation are not inconsistent merely because one extends its restrictions further than that of the other.

That situation has been frequently discussed in connection with legislation by municipal corporations with respect to which it is said in 43 C. J. 219-220:

> "As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own proscriptions."

The same principle is followed by the United States Supreme Court in determining whether there is a conflict between national and state regulation. The cases of *Savage v. Jones,* (1912) 225 U. S. 501, 32 S. Ct. 715, 725-726, 56 L. ed. 1182 and *Dickson v. Uhlmann Grain Co.,* (1932) 288 U. S. 188, 200, 53 S. Ct. 362, 365-366, 77 L. ed. 691, 83 A. L. R. 492 are exactly in point. It was held in both cases that restrictive legislation by Congress which expressly excepts certain situations from its restriction leaves states free to deal with the excepted subject matter. In the same manner as was done in the above cases, Congress has imposed a partial restriction, thus limiting the scope of its prohibitions and manifested its intent to occupy a limited field, leaving the unoccupied portion to states.

B. Section 8 (3) of the National Labor Relations Act did not prevent further restriction by states against compulsory unionism, even before Congress made a specific provision to that effect

Before Congress enacted an affirmative provision to establish that it never intended to extinguish the power of states to restrict compulsory unionism, attempts were sometimes made, as is done by the petitioner, to construe the excepting proviso of sec. 8 (3) of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. A. §158 (3) as if it *authorized* closed shop contracts (The same proviso is contained in the Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U. S. C. A. Supp. §158 (3).

Such an interpretation would be contrary to both the spirit and the letter of the provision, which is aimed to restrict compulsory unionism rather than to encourage it. *Authorization* of closed shop contracts was unnecessary, because they are recognized as valid in the absence of legislation to the contrary.

Literally, the excepting proviso quoted at page 8 of the petitioner's brief simply removes from the restrictive purview of "*this* act" certain subject matter which would otherwise be within the proscription of the section. By excepting such contracts only from the prohibition of "*this act,*" and of other statutes "*of the United States,*" Congress showed that it did not intend to formulate a policy for states; or it would have added a phrase to that effect instead of limiting the exception by the quoted words.

There is a vast difference between simply *not prohibiting a certain course of conduct and authorizing such conduct.*

That Congress did not intend the proviso in §8 (3) of the National Labor Relations Act to preclude states from regulating or prohibiting contracts making union membership a condition of employment is made clear by the following excerpt quoted from the report of the Senate Committee on Education, upon the recommendation of which Congress adopted the provision in question:

> "* * * *In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal;* it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.
>
> "*The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent laws regarding closed-shop agreements.* While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective bargaining unit covered by such agreement when made." (Emphasis supplied.) (Senate Report on Public Bills, 74th Cong., 1st Sess., Report #573)

As to the subject matter included in the excepting proviso Congress simply left the question in *status quo*, outside the scope of the Act. By so doing it implied "that in such matters federal policy is indifferent, and since it is indifferent as to what the individual may do of his own volition, we can only assume it to be equally indifferent to

what he may do under compulsion of the state." *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234.

The petitioner argues that if an employer refused to enter a demand for a closed shop contract contrary to a state law he would be found by the national board to have committed an unfair practice. In view of the policy of the national board of refusing even to conduct referenda in states where such contracts are forbidden by state law, such an assertion is manifestly without basis. The board decisions cited by the petitioner at p. 9 of its brief* do not involve such a situation. In those cases the employer refused to deal at all with the chosen agent of the employees, because he had no license under a state law which was later held invalid in *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

Refusing to deal at all with the chosen agent of the employees is not comparable to a refusal to agree to incorporate a specific provision in a contract because it is illegal.

In 2 Teller, *Labor Disputes and Collective Bargaining*, 879-880, §327, where it is said:

> "Bargaining in good faith under Section 8 (5) of the Act must be understood as negotiating within the framework of four main limits. The first is expressed in the rule that the Act does not compel the making of agreements. The Senate Committee on Education and Labor, in its report accompanying the National Labor Relations Bill, specifically stated that 'The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agree-

*Eppinger & Russell Co., 56 N. L. R. B. 1259 and Tampa Electric Co., (1944) 56 N. L. R. B. 1270.

ments or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' The Board has stated in a number of cases that the Act is not intended, by virtue of anything contained in Section 8 (5) thereof *or any other section*, to compel the making of agreements.

"The second limit, which in one sense is probably a restatement of the first, is in other respects, and in the light of varying facts, an extension of the first. The Act does not compel an employer to meet the demands made by the union." (Emphasis added.)

The obligation to bargain imposed upon an employer requires him to discuss his position in good faith with respect to a demand for a union shop as with respect to any other demand. Nothing in the law, however, requires that he accede to such a demand; nor can any case be cited in which any employer has been found guilty of an unfair practice for refusing to agree to a provision for compulsory unionism which violates state law.

C. Section 10 (a) of the National Labor Relations Act did not preclude states from consistent regulation.

The petitioner argues that sec. 10 (a) of the National Labor Relations Act precludes states from any regulation of unfair practices of employers "in" interstate commerce.

That section provided that the national board is empowered to prevent any person from engaging in any unfair practice "(*listed in section* 158) *affecting commerce*," and it was *such power* that is made exclusive in the succeeding sentence. 49 Stat. 453, 29 U. S. C. A. §160 (a).

Since the power extends only to unfair practices "listed in section 158" and to practices "affecting commerce," practices which are not listed or those which have not been brought within the definition of the term "affecting commerce" by the method set up for making such determination are not within the scope of the provision. The term "affecting commerce" is defined to mean "in commerce or tending to lead to a labor dispute burdening or obstructing commerce."

The unfair practice involved in the instant case did not arise "in" commerce. The employees in the unit are all engaged in production. Nothing in the record indicates that any of them are involved in shipping or transportation. If the controversy falls within the scope of sec. 10 (a), it can do so only on the ground that it tends to lead to a dispute which would burden or obstruct commerce. The only agency which is authorized to make such a finding is the National Labor Relations Board.* Furthermore, the exclusive nature of the enforcement proceeding extends only to

*These contentions are discussed in greater detail in our brief in **International Union U. A. W. A. etc. v. W. E. R. B. et al.**, Nos. 14 and 15, copy of which will be supplied to the petitioner, and the argument will, therefore, not be duplicated here, because we deem that other issues are controlling.

such practices as are enumerated and sought to be prevented in that act. Where Congress delimited its regulation intentionally, as it has done with respect to compulsory unionism, it obviously intended the exclusive character of the preventive enforcement machinery to be comparably delimited.

This court specifically considered the grant of "exclusive" power by sec. 10 (a) in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and concluded that as to substantive questions on which Congress had not otherwise shown an intent to preclude states, the provision relating to the exclusive character of the enforcement machinery did not of itself accomplish that result.

In the face of that provision this court still recognized in *Bethlehem Steel Co. v. New York Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234, that Congress had "dealt with the subject but partially" and as to "closely related matters" which it left free of regulation, it implied that states might act.

The *Bethlehem case* involved facts in which the national board had not only taken jurisdiction of the question of appropriate bargaining units in the specific plants but had also laid down a general policy on the subject which the state endeavored to supersede. The case is not comparable to the one now before the court. Here there can be no possibility of conflict in a field preempted by Congress, because Congress has manifested its intent to leave room for state regulation. The words in the *Bethlehem Steel* case "are to be read in the light of the facts of

the case under discussion" because "expressions transposed to other facts are often misleading."*

II.

THE FACT THAT LOCAL 1521 WAS SELECTED AS A BARGAINING REPRESENTATIVE OF THE COMPANY'S EMPLOYEES IN AN ELECTION CONDUCTED BY THE NATIONAL BOARD DOES NOT PREVENT A STATE FROM ENFORCING ITS LAWS PROHIBITING CONTRACTS REQUIRING UNION MEMBERSHIP

It has been held in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board,* (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and *Hill v. State of Florida,* (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, that a state law may not so deal with labor relations left subject to its control as to effect a forfeiture of bargaining rights or to stand as an obstacle to the accomplishment of the objectives of Congress. The petitioner argues that the state board's order effects a forfeiture of bargaining rights, as if the certification of a bargaining representative pursuant to an election conducted by the national board conferred upon the employer and the representative absolute power to contract as they please, without regard for state law.

We believe there is nothing in any fedefal legislation indicating that collective bargaining shall be on a different plane than any other type of contract negotiation, or that the parties are authorized to enter into contracts made ille-

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*Armour & Co. v. Wantock, (1944) 323 U. S. 126, 132-133, 65 S. Ct. 165, 89 L. ed. 118.

gal by the law of the forum in which the contract is made and to be performed.

It was stated by the United States Supreme Court in *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 263, 84 L. ed. 738, 60 S. Ct. 561, that the National Labor Relations Act does not create new rights but merely defined pre-existing ones. The right to bargain collectively which was so recognized was the usual right of contracting parties to negotiate through agents, subject to the applicable laws of the forum in which the contract was to be executed and performed.

Since the *National Labor Relations Act* created no new rights of contract, but merely set up machinery to prevent the infraction of pre-existing rights, it would seem to follow that state laws dealing with legality of the subject matter of contracts, which would have been valid prior to the enactment of the federal legislation, would not be invalid by reason of the mere enactment of such legislation.

The right of collective bargaining which is recognized by the National Labor Relations Act, relates to the *process* of bargaining rather than to the content of the agreement reached.

As stated in *Terminal R. Ass'n. v. Brotherhood of Trainmen*, (1943) 318 U. S. 1, 87 L. ed. 571, 63 S. Ct. 420, 423, the Supreme Court said:

> "The Railway Labor Act *like the National Labor Relations Act*, does not undertake governmental regulation of wages, hours, or working conditions. * * * The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point

of interfering with interstate commerce.". (Emphasis added)

The certification of a bargaining representative by the National Labor Relations Board does not increase the rights which such a representative would have if its status had been determined in some other manner. The right to bargain collectively is universal, whereas the board's services to determine the bargaining agent are used in comparatively few cases. The certification does not of itself require anybody to do anything. As stated in *Southern S. S. Co. v. National Labor Relations Board*, (1941) 120 F. 2d 505, 506-507:

> "A certification proceeding is of a nonadversary, fact-finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation."

A certification does not clothe the certified representative with any of the attributes of a governmental agency, nor does it operate as a sanction of whatever agreement may be entered. Whatever authority the union has emanates *not from the National Labor Relations Board or from the federal act but rather from the employees* who appointed it as their agent.

Collective bargaining is a branch of the laws of contract and agency. The powers of the chosen agent do not exceed the powers of its principals. The power to contract, either directly or through an agent, has always been subject to the police power of the state in which the contract is made and to be performed. See *Restatement, Conflict of Laws*, secs. 347 and 360 which read in part:

"Sec. 347. The law of the place of contracting determines whether a promise is void or voidable for * * * illegality * * *."

"Sec. 360(1). If the performance of a contract is illegal by the law of the place of performance at the time for performance, there is no obligation to perform so long as the illegality continues."

Congress evinced no intent in the National Labor Relations Act or the Labor-Management Relations Act, 1947 to alter the settled state of affairs as to determining the legality or illegality of the *content* of a contract.

It is inconceivable that Congress intended, by encouraging the process of collective bargaining, to make the will of the bargainers superior to the police power of the state. Surely it would not be contended that an employer and the bargaining representative of his employees might contract so as to relieve the former of the obligation to maintain safety devices or sanitary equipment required by state law or to carry workmen's compensation insurance, or so as to authorize him to employ child labor. All of these matters are usual subjects of collective bargaining. With respect to a proposed contract involving a provision relating to child labor, which was prohibited by state law, it was stated in *Globe Cotton Mills v. N. L. R. B.*, 103 F. 2d 91, 94, that the National Labor Relations Act does not contemplate bargaining about legislative policies.

It is as logical to argue that the powers of the contracting parties are superior to the police power in respect to the foregoing matters as to argue that the state may not limit the right to contract so as to protect the freedom of choice of individual workers from being extinguished by the combined power of the employer and labor unions.

CONCLUSION.

The field of compulsory unionism is one in which Congress has manifested its intent both expressly and impliedly that its regulation may be supplemented by that of the states. This court has said that Congress may exercise its authority "alone or in conjunction with coordinated action by the states."* No federal agency has challenged the state's action. Indeed, federal and state administrative agencies cooperate in carrying out the Congressional policy of an amicable, co-ordinated program. The state board's order under attack is a valid regulation under this program.

Respectfully submitted,

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*Prudential Ins. Co. v. Benjamin, 1945, 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342.

APPENDIX

WISCONSIN STATUTES PRIMARILY INVOLVED

Sec. 111.06 (1) (c) provides in part:

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

"* * *

"(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

Sec. 111.02 (9) provides:

"(9) The term 'all-union agreement' shall mean an agreement between an employer and the representative of his employes in a collective bargaining unit whereby all or any of the employes in such unit are required to be members of a single labor organization."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.
No. 216.

BRIEF ON BEHALF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AMICUS CURIAE.

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BRIEF ON BEHALF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AMICUS CURIAE.

Local 1521 of the United Brotherhood of Carpenters & Joiners of America, A. F. of L., hereinafter called the "Union," was the labor-union party to the contract with the Algoma Plywood & Veneer Company, petitioner herein, which contract gave rise to the proceedings which are now before this court. The Union intervened as a defendant in the proceedings before the Wisconsin Employment Relations Board and appealed to the Circuit Court from the adverse ruling of the state board.

The United Brotherhood of Carpenters & Joiners of America, A. F. of L., now files this brief amicus curiae because it believes the order of the Wisconsin Employment

Relations Board, which was enforced by the Circuit Court and affirmed by the Wisconsin Supreme Court is contrary to law.

SCOPE OF BRIEF.

This brief will discuss the question of the authority of the state board, first, to entertain jurisdiction at all over the subject matter and the parties; secondly, to enter an order which is inconsistent with the federal law, policy, and regulations.

This brief is directed to the propositions that the state board cannot take jurisdiction in the first instance, and in the alternative, if it does have the power, it cannot enter and enforce an order which is in conflict with the federal law.

ARGUMENT.

I.

The Restrained Activity Is One Which Is Protected Under the National Labor Relations Act.

At the time of the dismissal of the employee in the instant case, Section 8 (3) of the National Labor Relations Act (49 Stat. 449, 29 U. S. Code, Par. 151 et seq.) provided that:

> "It shall be an unfair labor practice for an employer * * * (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

The union was certified as the exclusive bargaining representative of the employees of the Algoma Plywood & Veneer Co. in 1942 (R. 19) for the same bargaining unit covered by the instant agreement. The employee was discharged pursuant to a union security contract which provided for maintenance of membership.

This provision had been inserted in the 1943 contract and subsequent contracts upon the recommendation of a

federal conciliator in accordance with the policy of the National War Labor Board.

What the State of Wisconsin has termed an unfair labor practice is the discharge of an employee who did not maintain his membership in the labor organization because he failed to pay his dues, as required by the contract existing between the parties. The Board drew its authority from 111.06 (1) (c), which provides:

> "It shall be an unfair labor practice for an employer individually or in concert with others:
>
> "(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provide that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

It is submitted that this contract is permitted and protected under the then provisions of Section 8 (3) of the National Labor Relations Act. See **National Licorice Company v. National Labor Relations Board**, 309 U. S. 350, 360; **Peninsular & Occidental Steamship Company v. National Labor Relations Board et al.**, 98 Fed. (2nd) 411, 414 (cert. den. 305 U. S. 653); **National Labor Relations Board v. Reed & Prince Manufacturing Co.**, 118 Fed. (2nd) 874, 883 (cert. den. 313 U. S. 595).

II.

The Wisconsin Board and Courts Had No Jurisdiction and Therefore the Order and Judgment Are Void Under Article I, Section 8 and Article VI of the Constitution of the United States.

The question of jurisdiction was raised before each tribunal on the authority of **Bethlehem Steel Co. v. New York State Labor Relations Board,** 330 U. S. 767, and each, the Board, the Circuit Court, and Supreme Court of the State of Wisconsin, rejected it. The Supreme Court held that (R. 63), "The **Bethlehem** case has limited the case by case doctrine commonly attributed to the Wisconsin decisions, only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the State Board are effective to defeat the purpose and policy of the exercise."

Congress by Enacting the National Labor Relations Act Preempted the Field of Employer Unfair Labor Practices.

Section 7 of the National Labor Relations Act, supra, in the form in which it appeared at the time of the discharge provided that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[1]

[1] Subsequently, this section was amended to read "and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Public Law 101, 80th Congress, June 23, 1947, hereinafter referred to as the Labor Management Relations Act. This amending language, however, is not applicable to the instant case.

The federal law also provided in Section 8 (1) that "it shall be an unfair labor practice for an employer, (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Union security contracts are the result of collective bargaining within the meaning of section 7 and entering into such a contract under the conditions of section 8 (3) was specifically exempt from the unfair labor practice provisions of the law. These expressions of Congress indicate an intent to preempt the field of labor disputes dealing with unfair labor practices of employers in commerce.

This court discussed pre-emption in the field of labor disputes in the case of **Allen Bradley Local 1111 v. Wisconsin Employment Relations Board**, 315 U. S. 740. It found in that case that there was no pre-emption because "Congress designedly left open an area for state control," and the control by Congress was not so pervasive as to prevent Wisconsin from supplementing federal regulation. There, however, this court was dealing with employee unfair labor practices about which the federal law was silent.

But in the **Bethlehem** case, supra, the court said that "when Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own." **Texas & Pacific Railway Co. v. Rigsby**, 241 U. S. 33, 41; **Hill v. Florida**, 325 U. S. 538. If what Congress has enacted into the National Labor Relations Act as it pertains to unfair labor practices of employers is within the language of this rule, we may conclude that it intended pre-emption.

In the National Labor Relations Act, Congress declared the policy of the United States as follows:

> "Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To implement this policy the provisions of Section 8 and Section 10 were drafted into the law. Section 8 defined unfair labor practices on the part of employers, and imposed certain limitations on their activities, while section 10 (a) of the federal law (at the time of the entry of the order) provided

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has

been or may be established by agreement, code, law or otherwise."

Section 10 (a) clearly indicates that "Congress has intended no regulation except its own."

This intent to vest exclusive power in the National Board has recently been confirmed by the insertion of section 10 (a) in the Labor Management Relations Act of 1947. That section now provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial Statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act, or has received a construction inconsistent therewith."

If it was the congressional desire not to preempt the power of the board in amended section 10 (a) would not have been emphasized by the words "shall not be affected by any other means of adjustment," and it would not have been further delineated by the authority to cede jurisdiction except in the specific industries of mining, manufacturing, communications, and transportation.

In so amending the law, Congress took heed of Justice Frankfurter's analysis of the majority opinion in the **Bethlehem** case, which he said meant that it was beyond the power of the National Board in its discretion to agree with state agencies to divide jurisdiction over disputes, which could not be covered by the National Board alone. Congress now made it clear that there was an area where jurisdiction could be ceded.

The **Bethlehem** case involved the right of the New York State Labor Relations Board to conduct an election and to certify a bargaining representative among employees of an employer over which the National Labor Relations Board clearly had jurisdiction, although it had taken no positive action in the particular case. Hence, Sections 9 (b) and 9 (c) of the National Labor Relations Act were involved and not Section 10 (a). No words of sole power to handle the representation cases appeared in the National Labor Relations Act or now appear in the Labor Management Relations Act. It thus seems reasonable to assume that if, as Justice Frankfurter supposed, in his dissenting opinion in the **Bethlehem** case, the decision of the court meant that the National Board's jurisdiction under the National Labor Relations Act was exclusive in representation cases, then, a fortiori, the federal board's jurisdiction was exclusive in unfair labor practice cases since Section 10 (a) did include an express provision to that effect.

And even if there were not the express exclusive power contained in Section 10 (a) of the federal act, exclusion of state action in this case is nevertheless demonstrated under the test set forth in the **Bethlehem** Case since here (p. 775)

> "* * * both governments have laid hold of the same relationship for regulation, and it involves the same

employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this kind of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter * * *. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. * * * But the power to decide a matter can hardly be made dependent upon the way it is decided. * * * We do not think that a case by case test of federal supremacy is permissible here."

Wisconsin and the federal government are each seeking to regulate differently the unfair labor practices of employers in matters affecting and involving interstate commerce. Each has created an administrative agency with a discretion in applying the plan of regulation. Under the federal act certain limits are placed upon the type of relief which may be granted [Section 10 (c)]. Wider discretion, however, is vested in the Wisconsin Board [Section 111.07 (4), Wisconsin Statutes]. There are differences in the definition of terms in the National Act, as compared with the Wisconsin Act, e. g., "employee" and "labor dispute." There is a difference between the union security provisions of Section 8 (3) of the federal law and Section 111.06 (1) (c) and 111.02 (9), Wisconsin Statutes. A discrepancy exists in the pattern of employer unfair labor practices as set forth in Section 8 of the federal act as compared with Section 111.06 (1), Wisconsin Statutes. To permit concurrent jurisdiction under such circumstances would destroy the uniform plan of regulation emphasized by Congress.

In the **Bethlehem** case, the particular question of representation therein involved had not been presented to the

National Board. Nevertheless, this Court held that the State could not have concurrent jurisdiction over the same subject matter. In the instant case, not only was the union certified by the National Labor Relations Board in 1942, but the National Board had previously taken jurisdiction of an unfair labor practice complaint against this employer. **In re: Algoma Plywood & Veneer Co. and Local 1521, United Brotherhood of Carpenters & Joiners of America (A. F. of L.)**, 26 N. L. R. B. 975. Enforcement denied, **N. L. R. B. v. Algoma Plywood & Veneer Company**, 121 Fed. (2nd) 602 (1941). Such exercise of power constituted an assumption of jurisdiction and was an assertion of "control of their labor relations in general." This general control was sufficient to oust the state of jurisdiction. See **Bethlehem Steel** Case at p. 776.

There is no question but that unfair labor practices under Section 8 (3) of the National Labor Relations Act have been ruled on frequently by the National Board, establishing precedent, and this leaves no possible room for a construction permitting concurrent jurisdiction.

Further indicative of the intention of Congress at the time of the discharge in the instant case is the fact that not until the National Labor Relations Act was amended was there anything written into the Federal Law which gave the state the authority to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. It can reasonably be concluded that because the Congress felt that the state did not have this right under the old law, such right was incorporated in Section 14 (b) of the Labor Management Relations Act of 1947.

The opinion of the Wisconsin Supreme Court refers to Congressional Committee Reports (R. 65) as they apply to an interpretation of Section 8 (3) of the National Labor

Relations Act. In an annotation appearing at 70 A. L. R. 5, there is extensive treatment of the weight to be given to committee reports. It is said there that such reports are to be considered only where the statute is ambiguous or obscure. Here, we have neither. Also pertinent is the holding of this court in **Downes v. Bidwell**, 182 U. S. 244, 254, in which it is said that "The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." See also **MacKenzie v. Hare**, 239 U. S. 299.

Recently two other state supreme courts have interpreted their own state Labor Relations Acts in the light of the **Bethlehem** case. These are the states of Pennsylvania and New Hampshire. In both cases the State Supreme Court held that Congress had pre-empted the field by enacting the National Labor Relations Act, and that the State Board no longer had any jurisdiction. See **Pittsburgh Railways Company Substation Operators and Maintenance Employees Case**, 357 Pa. 379, 54 At. (2nd) 891, and **International Union of Teamsters, etc., v. Riley**, 59 At. (2nd) 476 (N. H., 1948). The Pennsylvania case was a representation case, while the New Hampshire case involved an unfair labor practice similar to that before this court. Wisconsin, alone, clings to jurisdiction in industries affecting interstate commerce.

It is submitted that the situation which was contemplated by the **Allen-Bradley** case, supra, has now come into being, and the circumstances set forth in the **Bethlehem** case, supra, as evidencing the desires of Congress to exclude state action are clear and certain. **Gerry v. Superior Court**, 194 Pac. (2nd) 689 (Calif., 1948).

Under the National Labor Relations Act, then, the Congress had engaged in a comprehensive system of regulation of the activities of employers, such regulation invoking the processes of the National Labor Relations Board. By its declaration of policy, the establishment of unfair labor practices, and Section 10 (a), Congress made clear its intention to preempt the field.

III.

Where Congress Has Regulated a Subject Matter Permitting Concurrent State Regulation, the State May Act Only in a Manner Consistent With the Congressional Action.

In the first part of this brief we have enumerated the various aspects of the federal law which indicate the Congressional intent to act exclusively in the field of labor relations in those areas over which the federal Congress has imposed regulation. But if it should be construed that there was no federal preemption and the state retains concurrent jurisdiction over labor disputes, nevertheless, the state may not act in a manner inconsistent with the regulation of Congress over a particular relationship.

This court said in the **Allen-Bradley** case, supra, that since the area of employee activities was unregulated, Congress was indifferent to what the individual may do under the compulsion of the state, and since the state law covered the area of labor relations not dealt with by the federal act, the order of the state agency was not in conflict with the federal act.

It said "* * * If the order of the State Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question

would arise. * * * It has not been shown that any employee was deprived of rights protected or granted by the federal act or that the status of any of them under the federal act was impaired" (**Allen-Bradley** case, supra, p. 751).

The contract in question is the direct result of collective bargaining which was engaged in pursuant to Section 7 of the national law, and is the embodiment of collective bargaining rights, specifically exempt from limitation by section 8 (3). To enforce the Board's order to cease and desist from effectuating the contract would foreclose the employer and the union from the right to bargain for a maintenance of membership or other union security provision. This court has declared that such provisions are "frequent subjects of negotiation between employers and employees." **National Licorice Co. v. National Labor Relations Board**, supra; **Consolidated Edison Company v. National Labor Relations Board**, 305 U. S. 236; **National Labor Relations Board v. Sands Manufacturing Company**, 306 U. S. 332 at 342. Denial of the right to negotiate for a union security provision would cause a forfeiture of collective bargaining rights protected by section 7, which are precisely the kind of rights this court said it would protect in the **Allen-Bradley** case.

We have shown that the instant case does deal with an area over which the federal Congress has exerted its power and that the state policy and rules do conflict with federal law. In order for the parties to submit and comply with the state rule and judgment it is clear they would be deprived of benefits that all similar employers and employees outside the state may enjoy, and consequently be at a competitive disadvantage with those persons outside the state. They must necessarily forfeit a right assured them by the National Labor Relations Act.

Section 111.06 (1) (c) of the Wisconsin Statutes provides that it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization, by discrimination in regard to hiring, tenure or other terms or conditions of employment; "provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where at least two-thirds of such employees voting (provided such two-thirds of the employees also constitute at least a majority of the employees in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board. • • •"

Section 8 (3) of the National Labor Relations Act provides for a similar unfair labor practice by the employer with a proviso which allows a union security agreement to be made; the only condition being that the agreement be made with the authorized representative of the employees.

Comparing the two sections, we note that they both make encouragement or discouragement by discrimination an unfair labor practice, but there is a two-fold conflict between them: first, the proviso in the state law requires a vote with a two-thirds majority of the employees voting, to legalize the contract, and second, it is essential that such two-thirds majority also constitutes a majority of the eligible voters in the unit to validate the agreement. Contra, the federal law requires no sanctioning vote at all, the status of bargaining representative of a majority of the employers being sufficient. This approving vote required by the state deprives employers and employees in industries affecting commerce of the freedom of bargaining which they are granted by the federal law.

The cases are all in accord that where there is conflict between the state act and the federal act so as to impair federal rights, the state may not regulate a labor dispute of an employer whose business affects commerce. **Allen-Bradley Local v. Wisconsin Employment Relations Board**, supra, at page 751; **International Union etc. v. Wisconsin Employment Relations Board**, 245 Wis. 417 at 425; **Hill v. Florida**, 325 U. S. 538.

In the **Hill** case, like the instant case, the situation which this court says was not present in the **Allen-Bradley** case had come into being namely, the situation where the full freedom of collective bargaining, the object to be accomplished by the National Labor Relations Act, was restricted by the state law. There, a business agent had to be licensed by the state before he could represent employees in collective bargaining. Here the required vote under the auspices of the state board is tantamount to a license. In applying the reasoning of the **Hill** case to the situation at hand, the full freedom of collective bargaining to enter into this kind of contract herein executed, which Congress envisioned as essential to protect the free flow of commerce among the states would be "shrunk to a greatly limited freedom" by the state of Wisconsin.

The requirement of a licensing vote, pursuant to the Wisconsin Law, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." **Hines v. Davidowitz**, 312 U. S. 52, at 67; **Napier v. Atlantic C. L. R. Co.**, 272 U. S. 605.

Should this court construe the federal act as leaving room for the Wisconsin Legislature to act in this field of regulation, then it is submitted that the State of Wisconsin had no power to act in the manner that it did, repugnant to the federal law.

CONCLUSION.

It is respectfully submitted that the Wisconsin Statute and the order issued by the Wisconsin Employment Relations Board, pursuant to alleged authority vested in it by the statute, cause a forfeiture of rights which have been safeguarded by the federal law. The National Board, having exclusive jurisdiction over the relations of the parties, as proclaimed by the federal law, the state should not be permitted to impair, dilute, or qualify in any respect the rights granted by the federal law. This court has spoken quite clearly and has indicated in the **Bethlehem Steel** case that the federal power is paramount in the field of labor relations affecting interstate commerce. Despite this pronouncement, the State of Wisconsin has in several instances acted to defeat the declarations of this court.

In its opinion in the instant case, the Wisconsin Supreme Court has said that if the Board is to be in effect abolished, that abolition will have to be accomplished by the Supreme Court of the United States. We are not here seeking abolishment of the Wisconsin Board or the regulation. That board has jurisdiction over matters which have not been regulated federally. Denial of jurisdiction in federal matters comes not from the desires of any court or person, but flows from the superior power vested in the Congress by the Constitution of the United States. It is respectfully submitted that reversal of the state court judgment is required so that the flow of commerce, as declared by the federal law in its paramount right can remain completely free.

Respectfully submitted,

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